88-447

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RODNEY G. VEST

Petitioner

v.

MARIAN SCHAFER and STATE OF ALASKA

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF ALASKA

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September, 1988

QUESTIONS PRESENTED

1. Is the State of Alaska subject to a constitutional or section 1983 damage claim in state court for enacting and enforcing unconstitutional residency requirements as part of a state senior citizen entitlement program?

2. Is a state a "person" subject to a damage claim under 42 U.S.C. § 1983?

3. Is a state subject to a constitutional damage claim under the rationale of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and its progeny?

4. Is a state subject to a constitutional or section 1983 damage claim in state court for enacting and enforcing a statute in clear violation of the equal protection clause and the due process clause of the Fourteenth Amendment?

5. Does an attempt by a state legislature to impair the courts' ability to provide a remedy for unconstitutional legislation give raise to a constitutional damage claim against a state?

6. Is a state officer subject to a personal capacity suit for executing a statute in clear violation of the Fourteenth Amendment?

7. May a state be held vicariously liable for the actions of a state officer who executes a statute in clear violation of the Fourteenth Amendment?

LIST OF PARTIES

Respondents Marian Schafer and the State of Alaska are the defendants in this action. Marian Schafer is a defendant in both her official and personal capacities. Petitioner Rodney Vest represents a class of plaintiffs too numerous to be named individually.

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MARIAN SCHAFER and STATE OF ALASKA
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF ALASKA

OPINIONS BELOW

The opinions of the state superior court are not published. The Alaska Supreme Court has issued two opinions in this case. The first opinion, which declares Alaska's Longevity Bonus Program unconstitutional, is reported as *Schafer v. Vest*, 680 P. 2d 1169 (Alaska 1984). The second opinion, which denies Rodney Vest and the plaintiff class an award of monetary damages, is reported as *Vest v. Schafer*, Sl. Op. No. 3346 (Alaska June 17, 1988), and is reprinted in the appendix. This opinion has not yet been published in the official reporter.

JURISDICTION

Rodney Vest and the plaintiff class brought suit in state court for declaratory and injunctive relief against the enforcement of an unconstitutional state statue and for damages. The state courts granted declaratory and injunctive relief. Plaintiffs then moved for an award of damages under 42 U.S.C. § 1983 and directly under the equal protection clause and the due process clause of the Fourteenth Amendment of the United States Constitution. The state superior court denied plaintiffs' motion. The Supreme Court of the State of Alaska issued and entered an opinion on June 17, 1988 affirming the lower court decision. No petition for rehearing was sought. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(3) to review the Alaska Supreme Court's decision.

CONSTITUTIONAL PROVISIONS AND STATUTES

The enactment of Alaska's Longevity Bonus Program and its enforcement by the State and Marian Schafer are called into question in this action. The act establishing this program was codified at A.S. 47.45.010 - .170. A copy of the act is included in the appendix.

Petitioners contend that the enactment and enforcement of the Longevity Bonus Program, when it was known to be unconstitutional, violated Section I of the Fourteenth Amendment of the United States Constitution which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioners also contend that the enactment and enforcement of the Longevity Bonus Program violated 42 U.S.C. § 1983 which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Petitioners contend that the Fourteenth Amendment, section 1983 and Article VI of the United States Constitution mandate an award of damages under the circumstances presented in this action. The second clause of Article VI states:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

STATEMENT OF THE CASE

In the spring of 1972 the Alaska Legislature considered passage of a bill designed to provide monthly stipends to certain Alaska residents over the age of 65. This bill, known as the "Longevity Bonus Act," proposed to provide payments only to those senior citizens who had resided in the state for twenty-five years and who had commenced residency prior to the date of statehood.[1] The Legislature was fully aware that these residency requirements were constitutionally suspect, in part, because of the controversy over similar legislation passed in 1970 which had been vetoed by the Governor.[2] Anticipating a constitutional challenge, the Legislature designed the 1972 bill so as to make judicial recourse largely ineffective. A non-severability clause was included in the act so that the program would terminate if the residency requirements were declared invalid.[3] This provision reversed the normal presumption of severability under Alaska's statutes.[4] Thus, non-qualifying seniors would not be able to obtain any of the benefits which had been enjoyed by others even if their lawsuit proved successful.

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[1] Section 1 ch 205 SLA 1972; requirements codified at A.S. 47.45.010; App., pp. B1-7.

[2] House Journal 1970, p. 1609; Reply to Alaska's Opposition to Vest's Motion for Summary Judgment, Opposition to Alaska's Cross-Motion for Summary Judgment and Opposition to Alaska's Motion to Dismiss Claims Against Marian Schafer in Her Personal Capacity ("Vest Opposition"); Record, pp. 61-63; Notice to Supplement the Record filed 6/9/87 ("Record Supplement"); Record, pp. 170-77; Brief of Appellant, pp. 3-14.

[3] *Id.*; § 2 ch 205 SLA 1972; App., p B7. This section of the bill was not codified.

[4] A.S. 01.10.030 (§ 1 ch 98 SLA 1949) provides: "Any law heretofore or hereafter enacted by the Alaska legislature which lacks a severability clause shall be construed as though it contained the clause in the following language, 'If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be effected thereby'."

Upon reviewing the bill, the state Attorney General's office informed the Legislature and the Governor that it was constitutionally flawed.[5] In a bill review letter the Attorney General's office stated that "the [Longevity Bonus Act] classification predicated upon being domiciled in the territory on or before January 3, 1959 [,the date of statehood], bears little, if any, rational relationship to any legitimate legislative purpose which this bill is conceivably designed to serve and is thus in all probability unconstitutional."[6] The letter also states that "[i]t is clear that the intent of the legislature, expressed in Section 2 of the bill [,the non-severability clause], is to forestall the possibility that a partial declaration of unconstitutionality would result in broadening the coverage of the bill to include additional classes."[7]

Noting that the Longevity Bonus Act "raises serious constitutional and other problems," the Governor declined to sign the bill which then became law without his signature.[8] The act was codified at A.S. 47.45.010 - .170.

This Court decided *Zobel v. Williams*, 457 U.S. 55 (1982), on June 14, 1982. In *Zobel* the Court declared the residency preferences in Alaska's Permanent Fund distribution program "favoring established residents over new residents [to be] constitutionally unacceptable." 457 U.S. at 65. The Court ruled that none of the purported purposes of the residency requirements were "rationally served by the distinction [made] between citizens who established residence before 1959 [,the year of statehood,] and those who have become residents since then." *Id.*

Rodney G. Vest ("Vest") brought suit against Marian Schafer ("Schafer"), the administrator of the Longevity Bonus Program, and the State of Alaska on July 6, 1982

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[5] Vest Opposition; Record, pp. 61-63; Record Supplement; Record, pp. 170-77; Appellant's Brief, pp. 3-14.

[6] *Id.*

[7] *Appellants Brief*, p. 8.

[8] Senate Journal 1972, p. 1384; Vest Opposition; Record, pp. 61-63; Appellant's Brief, p. 9.

charging that he was being unconstitutionally excluded from receiving benefits under the program. An amended complaint filed July 20, 1982 made claims on behalf of a similarly situated class.[9] On August 9, 1982 Vest entered into an agreement with the State to stay prosecution of the complaint in exchange for an agreement by the State to use its best efforts to obtain a legislative settlement.

During the settlement hearings the Legislature was informed by the state Attorney General's office and by its own counsel that because of this Court's holding in *Zobel* there was "no chance whatsoever" of the Longevity Bonus Program being constitutional.[10] A settlement was proposed under which the Legislature would remove the offending residency requirements and appropriate $11.4 million to compensate the class for benefits retroactive to the date of the filing of its lawsuit. However, the Legislature's counsel informed it that individual legislators could not be held personally liable for failing to make the necessary appropriation.[11] Acting in apparent reliance on the absence of personal liability, the Legislature determined to take the "calculated risk" of "getting away scot-free" from a damage award and declined to make the appropriation.[12] Although the Legislature was on notice that the program's residency requirements were unconstitutional, it elected to leave them in place thereby prolonging the program's exclusionary payments for the period of time it would take the courts to enjoin the distributions. Schafer, as program administrator, continued to exclude Vest from obtaining benefits.

Vest's case then proceeded to trial. The superior court declared the Longevity Bonus Act to be unconstitutional and on April 6, 1984 the Alaska Supreme

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[9] For ease of reference Vest and the plaintiff class will be referred to collectively as "Vest."

[10] Vest Opposition; Record, pp. 57-58 and 123-24; Brief of Appellant, pp. 10-11.

[11] Vest Opposition; Record, pp. 65-69 and 133-34.

[12] *Id.*

Court summarily affirmed the lower court's decision. In a subsequent opinion the court explained that the case was controlled by this Court's holding in *Zobel*. *Schafer v. Vest*, 680 P. 2d 1169, 1170 (Alaska 1984). The court held that "the Longevity Bonus Program's [residency] classification does not survive even the lowest level of judicial scrutiny." *Id.* at 1171. Since the offending residency requirements were determined not to be severable from the rest of the program, the State was enjoined from enforcing the act in its entirety. *Id.* at 1170.

Vest subsequently moved for summary judgement asking for an award of damages against the State and Schafer under 42 U.S.C. § 1983. Vest also claimed damages directly under the state and federal constitutions citing the rationale of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) and its progeny.[13] Vest contended that the enactment and enforcement of the Longevity Bonus Program, when it was known to lack a rational basis and to unconstitutionally discriminate on the basis of residency, violated Vest's Fourteenth Amendment equal protection and due process rights.[14] In addition, Vest contended that the Legislature's attempt, through the adoption of the non-severability clause, to impede the courts' ability to remedy its constitutional violation was, itself, a substantive constitutional violation.[15] Further, Vest contended that Schafer was liable in a personal capacity action since there had been no constitutionally colorable basis for enforcing the offending residency requirements.[16] Vest also asserted that the state court's obligation under Article VI of the federal

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[13] Motion for Summary Judgment and Memorandum In Support ("Mot. for S. Judg."); Record, pp. 1-18.

[14] Mot. for S. Judg.; Record, pp. 1-18; Vest Opposition, pp. 61-74.

[15] Mot. for S. Judg.; Record, pp. 11-13.

[16] Vest Opposition; Record, pp. 74-82.

Constitution to apply and uphold federal law mandated an award of back benefits to the class.[17]

The superior court granted summary judgment in favor of the defendants ruling that (1) the State is not a "person" subject to a section 1983 action, (2) sovereign immunity protects the State from damage suits brought directly under the federal and state constitutions, and (3) in her personal capacity, Schafer is shielded by qualified immunity from liability under section 1983 and from actions brought directly under the state and federal constitutions.[18]

Vest raised on appeal the contentions urged below.[19] The Alaska Supreme Court affirmed the lower court ruling holding that a state is not a "person" subject to a section 1983 action. *Vest v. Schafer,* Sl. Op. No. 3346, p.17 (Alaska June 17, 1988); *App.* at A13. The court assumed, without deciding, that the federal Constitution requires state courts to award monetary damages in a *Bivens*-type action in circumstances in which federal courts would make such an award. *Id.* at 21; *App.* at A16. However, the court held that a *Bivens*-type claim does not lie against a state when it is based upon a legislative enactment found to be in violation of the equal protection clause of the Fourteenth Amendment. *Id.* at 27-28; *App.* at A21-22. The court did not reach the sovereign immunity question. *Id.* at 18; *App.* at A14. The court rejected those claims based on state law. *Id.* at 28-30; *App.* at A22-23.

The court did not reach the issue of Schafer's qualified immunity to personal capacity claims because it found that she was not a proper defendant. *Id.* at 32; *App.* at A25. The court stated alternative grounds for this conclusion. First, the court observed that Vest could only hope to obtain the sum at issue by using the personal capacity claim to

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[17] Mot. for S. Judg.; Record, pp. 1-18; Vest Opposition; Record, pp. 82-88.

[18] Memorandum of Decision; Record, pp. 180-89; *see also Vest v. Schafer*, Sl. Op. No. 3346, pp. 2-3 (Alaska June 17, 1988); *App.* p. A2.

[19] Brief of Appellant.

proceed against the state on a respondeat superior theory. The court then concluded that "[t]o hold the State vicariously liable [for Schafer's actions] would violate the prohibition against exacting relief from the State in personal capacity suits." *Id.* at 33-34; *App.* at A26.[20] Second, the court held that a state official is subject to a personal capacity suit only where the official's conduct is wrongful.[21] *Id.* at 34-35; *App.* at A27. The court concluded that Schafer was "entitled to give great weight to the vote of a majority of the legislators" who had approved the residency requirements and that the State's directive to enforce them was not sufficiently egregious for Schafer's compliance to be considered wrongful. *Id.* at 36-37; *App.* at A28-29.

REASONS FOR GRANTING THE WRIT

I. The Alaska Supreme Court's determination that the State of Alaska is not subject to a damage claim for enacting and enforcing a statute in clear violation of the Fourteenth Amendment raises important and unresolved problems.

Petitioners contend that the dispositive issue in this case is whether the State enacted and enforced legislation in good faith. The State did not show that it acted in good faith nor did the Alaska Supreme Court so find. The court

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[20] It is not clear from the opinion what prohibition the court refers to. Presumably this is a reference to the law governing section 1983 suits in circumstances where Eleventh Amendment immunity applies.

[21] This alternative analysis was necessitated by the court's acknowledgement that Vest could properly seek to obtain monies from any insurance policies, official bonds or indemnification agreements which would be payable to Schafer. The court questioned, but did not decide, whether monies paid to Schafer by the State under an indemnification agreement would be an appropriate source of recovery.

tacitly rejected Vest's contention that a state's failure to legislate and enforce legislation in good faith makes it subject to a claim for damages.

The court also tacitly rejected Vest's contention that a state is subject to a damage claim where it enacts and enforces legislation which violates substantive due process requirements. The legislation at issue had no rational basis; there was no rational relationship between any colorable state purpose underlying the act and its residency requirements. The act's statement of purpose is illogical, self-contradictory and patently pretextual.[22] The State offered the court no plausible explanation of the relationship between the act's purported purposes and its residency requirements. The court did not perform a constitutional balancing of state objectives against individual rights to determine if the legislation could satisfy the requirements of equal protection. As the court acknowledged, the legislation failed even the lowest level of judicial scrutiny. *Schafer*, 680 P.2d at 1171.

Further, this was not the first time the State had been called to account for discriminating on the basis of residency. The State has a long record of constitutional infractions in this area.[23] Other residency cases now pending in the courts suggest that this episode may not be the last.

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[22] Section 1 ch 205 SLA 1972, codified at A.S. 47.45.170; App., p. A6-7.

[23] The following cases have addressed attempts by the State of Alaska to exclude non-residents and new residents from the benefits of Alaska's development. *Brown v. Anderson*, 202 F.Supp. 96 (D. Alaska 1962) (three-judge court) (act authorizing closing of commercial fishing areas to non-residents violates both the privileges and immunities clause and the commerce clause); *State v. Wylie*, 516 P.2d 142 (Alaska 1973) (one year durational residency requirement for state employment preference violates equal protection); *Lynden Transport, Inc. v. State*, 532 P.2d 700 (Alaska 1975) (discrimination against non-resident motor carriers violates equal protection); *Hicklin v. Orbeck*, 565 P.2d 159 (Alaska 1977) (one year durational residency requirement for employment on Alaska Pipeline violates equal protection, residency requirement upheld) *rev'd* 437 U.S. (Footnote Continued)

By failing to recognize a damage remedy as a sanction for the State's willful conduct, the decision presented here effectively condones the determination by the State and State agents to ignore established constitutional prohibitions. If allowed to stand, this decision ratifies a procedure which permits a majority of state legislators to completely exclude targeted minorities from receiving very substantial state benefits. Petitioners urge that the decision raises serious and unresolved problems of constitutional dimension which have not been, but should be, addressed by this Court.

II. The Alaska Supreme Court's determination that a state is not a "person" subject to a section 1983 action presents a question which this Court has already decided to review.

At least one circuit of the federal court of appeals has decided, contrary to the determination by the Alaska Supreme Court, that a state is a "person" subject to suit under section 1983. *See, Della Grotta v. Rhode Island*, 781 F.2d 343, 348 (1st Cir. 1986). This Court has recently decided to take review of this question in *Smith v. Department of Public Health*, 410 N.W.2d 749 (Mich. 1987), *cert. granted sub nom. Will v. Michigan Department of State Police*, ___ U.S. ___, 99 L.Ed.2d 696 (April 19, 1988). Since the Court has already taken review of one of the dispositive questions presented here, petitioners urge that the Court's review of this action is indicated.

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518 (1978) (residency requirement for employment on Alaska Pipeline violates privileges and immunities); *Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979) (state land disposal based in durational residency up to ten years unconstitutional on other grounds); *Williams v. Zobel*, 619 P.2d 448 (Alaska 1980) (taxing only the income of persons who had resided in the state three years or less violates equal protection); *Zobel v. Williams*, 457 U.S. 55 (1982), (making monetary distributions to individuals based on the length of state residency dating back to date of statehood violates equal protection).

III. The broader question presented by the Alaska Supreme Court's more narrow determination that a state is not subject to a *Bivens*-type claim for enacting legislation in violation of the equal protection clause of the Fourteenth Amendment has been characterized by this Court as "extremely important."

The Alaska Supreme Court decided here that a state is not subject to a claim under the rationale of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and its progeny for enacting legislation which violates the equal protection clause of the Fourteenth Amendment. In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 278 (1977) the Court characterized the broader question of whether a *Bivens*-type claim can be asserted for violations of the Fourteenth Amendment as "extremely important," yet avoided answering it. Petitioners urge that the decision presented here warrants review by the Court given the importance of this question.

IV. The Alaska Supreme Court's determination that Schafer is not subject to a personal capacity action for executing a statute in clear violation of the Fourteenth Amendment appears to be at variance with the decisions of this Court.

The Alaska Supreme Court ruled in the decision raised here that Vest cannot bring a personal capacity action against Schafer for enforcing the Longevity Bonus Program residency requirements even though Vest contended that she knew or should have known that they were unconstitutional. The court reasoned that Schafer is not a proper defendant in such an action because she was "entitled

to give great weight to the vote of a majority of the legislators" favoring these requirements and that the State's directive to enforce them was not sufficiently egregious for her conduct to be wrongful. *Vest*, Sl. Op. No. 3346, pp. 36-37; App., pp. A28-29.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), this Court stated that "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." In *Butz v. Economou*, 438 U.S. 478, 495 (1978), the Court stated that "it cannot be doubted that [federal] officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution." [24] In *Anderson v. Creighton*, __ U.S. __, 97 L.Ed.2d 523, 530 (1987)(citations omitted), the Court reaffirmed that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action ... assessed in light of the legal rules that were 'clearly established' at the time it was taken." The Court clarified that "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, [citations omitted], but it is to say that in the light of preexisting law the unlawfulness must be apparent." *Id.* at 531.

In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 102 (1984), the Court acknowledged the general rule that "a suit challenging the constitutionality of a state official's action is not one against

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[24] This case and other holdings of the Court suggest that the qualified immunity standards applied to federal officials and state officials are very similar if not identical.

the State." [25] The Court observed that this rule is based on the rationale that "an unconstitutional enactment is 'void' and therefore does not 'impart to [the officer] any immunity from responsibility to the supreme authority of the United States'." *Id.* (citations omitted). The Court's discussion suggests that where there is no "colorable basis for the exercise of authority by state officials," such officials are subject to personal capacity suits. *Id.* at 100-03.

The unconstitutionality of the Longevity Bonus Program's residency requirements was apparent at the time the program was enacted. The state Attorney General's office put the State on notice that these residency requirements were unconstitutional. If this was not sufficient, this Court's holding in *Zobel v. Williams*, 457 U.S. 55 (1982), made continued enforcement of these requirements legally inexcuseable. No constitutionally colorable basis existed for Schafer's enforcement of them. Petitioners believe that the Alaska Supreme Court's holding that Schafer is not subject to a personal capacity suit for enforcing these residency provisions is at variance with this Court's decisions. Petitioners urge that the apparent conflict between the Alaska Supreme Court's ruling and the applicable decisions of this Court indicates that the Court should take review of this action.

CONCLUSION

The states' compliance with constitutional mandate is an essential underpinning of our political system. A state's willful breach of the Fourteenth Amendment not only violates the public trust, it undermines the incentive of other

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[25] This case addresses personal capacity issues in an Eleventh Amendment context. The Court observes that "[t]his rationale, of course, created the 'well-recognized irony' that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment." *Id.* at 104-05 (citation omitted).

states to observe the constitutional compact. The decision presented here teaches that a state may knowingly violate the Fourteenth Amendment without incurring a judicial sanction. If left standing, it invites other states to ignore established constitutional prohibitions in pursuit of parochial advantage. Petitioners urge the Court to take review of this decision and address the important questions of federalism and individual civil rights which it presents.

Respectfully submitted,

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APPENDIX

Appendix A

THE SUPREME COURT OF THE STATE OF ALASKA

RODNEY G. VEST, Appellant,	)	File No. S-2091
v.	)	*OPINION*
MARIAN SCHAFER and STATE OF ALASKA, Appellees.	)	[No. 3346 - June 17, 1988]

Appeal from the Superior Court of the State of Alaska,
First Judicial District, Juneau,
Walter L. Carpeneti, Judge.

Appearances: Henry J. Camarot and Mark A. Sandberg, Camarot, Sandberg & Smith, Anchorage, and Kris Cassity, Anchorage, for Appellant. Deborah Vogt, Special Assistant Attorney General, and Grace Berg Schaible, Attorney General, Juneau, for Appellees.

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton and Moore, Justice.
[Burke, Justice, not participating]

MOORE, Justice

I.

This case is before us for the second time. For many years, the State's Longevity Bonus Program paid monthly benefits to twenty-five year Alaska residents, age 65 or over, who had been domiciled in Alaska before statehood. AS 47.45.010-.170 (prior to amendment in 1984). In 1984, this

court held that the twenty-five year residency requirement and the pre-statehood domicile requirement violated the equal protection clause of the federal Constitution. *Schafer v. Vest*, 680 P.2d 1169, 1170-71 (Alaska 1984) (hereafter "*Schafer I*").[1] The superior court issued injunctive and declaratory relief. The prevailing party in *Schafer I* was Rodney Vest and the class of plaintiffs he represented. The defendants were the State and Marian Schafer, who was the administrator of the Longevity Bonus Program.

In 1985, Vest moved for summary judgment on the issue of damages. He requested as damages the amount the plaintiff class members would have received had the statute made them eligible for the benefits.[2]

Vest advanced three different causes of action to justify the damage award: one under 42 U.S.C. § 1983, one directly under the ~~federal~~ Constitution, and one under the state constitution. He brought this action against the State, against Schafer in her official capacity, and against Schafer in her personal capacity.

The superior court granted summary judgment to the defendants for the following reasons: (1) the State is not a "person" subject to a section 1983 action; (2) sovereign immunity protects the State from damage suits directly under the federal and state constitutions; (3) the claims against Schafer in her official capacity should be regarded as claims against the State; and (4) in her personal capacity, Schafer is shielded by qualified immunity from liability under section 1983 and directly under the state and federal constitutions.

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[1] The legislature promptly amended the statute so that all one-year residents, age 65 or over, were eligible for the bonus. AS 47.45-.010.-170 (as amended in ch. 38, § 2, SLA 1984).

[2] Such an award could be as much as $150 million.

Vest appeals.

II. DAMAGES AGAINST THE STATE

A. Is the State subject to suit under section 1983?

Congress adopted the provision that is now 42 U.S.C. § 1983 in what is known as the Civil Rights Act of 1871, or the Ku Klux Klan Act.[3]

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1981). In *State v. Green*, 633 P.2d 1381 (Alaska 1981) (per curiam), we held that a state is not a "person" subject to suit under section 1983. That holding would support the superior court's dismissal of Vest's section 1983 claim against the State.

However, the proper interpretation of section 1983 is a matter of federal law, on which the United States Supreme

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[3] The popular names are not in the enactment, [remainder of footnote missing from opinion.]

Court has the final word.[4] Vest argues that *Green* is inconsistent with several Supreme Court cases, and urges this court to overrule it. We respond to this argument.

In 1961, the Supreme court held that cities are not subject to suit under section 1983. *Monroe v. Pape*, 365 U.S. 167, 187-91, 5 L.Ed.2d 492, 505 (1961). The Court subsequently noted that "that being the case, [section 1983] could not have been intended to include States as parties defendant." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452, 49 L.Ed.2d 614, 619 (1976).[5]

In *Monell v. New York City Department of Social Services*, 436 U.S. 658, 689, 56 L.Ed.2d 611, 634 (1978) (7-2 majority), the Court reversed the *Monroe* result, explicitly holding that local government bodies were "persons who could be sued" under section 1983. Justice Brennan, the author of the *Monell* opinion, later observed that "Monell made it 'surely at least an open question whether § 1983 properly construed does not make the States liable for relief . . .'" *Quern v. Jordan*, 440 U.S. 332, 351, 59 L.Ed.2d 358, 373 (1979) (Brennan, J., concurring) (quoting *Hutto v. Finney*, 437 U.S. 678, 703, 57 L.Ed.2d 522, 542-53 (1978) (Brennan, J., concurring)).

In 1979, the Supreme Court decided *Quern v. Jordan*, 440 U.S. 332, 59 L.Ed.2d 358 (1979), the principal case debated

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[4] The Supreme Court recently decided to review the very question we now face, in *Smith v. Department of Pub. Health*, 410 N.W. 2d 749 (Mich. 1987), *cert. granted sub nom. Will v. Michigan Dep't of State Police*, ____ U.S. ____, 99 L.Ed.2d 696 (Apr. 19, 1988).

[5] However, "[t]he language in question from *Fitzpatrick* was not essential to the Court's holding in that case." *Quern v. Jordan*, 440 U.S. 332, 365 n.7, 59 L.Ed.2d 358, 365 (1979) (quoting *Hutto v. Finney*, 437 U.S. 678, 708-09 n.6, 57 L.Ed.2d 522, 546 n.6 (1978) (Powell, J., concurring)).

by the two parties in the present litigation and the case relied on by this court in *State v. Green*. *Quern* was a sequel to *Edelman v. Jordan*, 415 U.S. 651, 39 L. Ed.2d 662 (1974). *Quern*, 440 U.S. at 333, 59 L.Ed.2d at 362. In *Edelman*, the Court held that the eleventh amendment prohibited a federal district court from awarding retroactive welfare benefits wrongfully denied by state officials.[6] The majority of the Court viewed the eleventh amendment as barring federal court jurisdiction in unconsented suits against states or state officers where the state is the real party in interest and where the plaintiff requests monetary damages to be paid out of the state treasury. *Edelman*, 415 U.S. at 663-68, 39 L.Ed.2d at 672-76.

On remand in *Edelman*, the district court ordered state officials to send to each member of the plaintiff class a notice advising them that "there [were] state procedures available by which they [could] receive a determination of whether they [were] entitled to past welfare benefits." *Quern*, 440 U.S. at 334, 59 L. Ed.2d at 363. Whether the eleventh amendment prohibited the federal court from issuing that order was the sole question before the Court in *Quern*. *Id.* at 334, 59 L.Ed.2d at 362. The Court found that the order did not constitute a retrospective award requiring payment from the state treasury, and thus, under the rule reaffirmed in *Edelman*, did not violate the eleventh amendment. *Id.* at 347-49, 59 L.Ed.2d at 370-72. In the process, the Court once again held that Congress, by enacting section 1983, did not intend to

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[6] The eleventh amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of any Foreign State.

abrogate the states' eleventh amendment immunity.[7] *Id.* at 345, 59 L.Ed.2d at 358.

In *State v. Green*, we interpreted *Quern* "as holding not only that section 1983 does not abrogate the state's eleventh amendment immunity, but as holding that states are not 'persons' within the meaning of the section." *Green*, 633 P.2d at 1382. The consequences of the two are quite different: A holding that states are not "persons" subject to suit under section 1983 would bar all section 1983 suits against states, regardless of whether the suits were brought in state or federal court. On the other hand, a holding that section 1983 does not abrogate eleventh amendment immunity would leave unanswered the questions whether section 1983 suits against states could be brought in *state* court (since the eleventh amendment bars only federal jurisdiction) or, even in federal court, against states that have waived their eleventh amendment immunity. We now reaffirm *Green*, and supplement our prior reasoning.

The parties in *Quern* neither briefed nor argued the issue of whether Congress intended section 1983 to provide an action directly against states. *Quern*, 440 U.S. at 354, 59 L.Ed.2d at 375 (Brennan, J., concurring). Furthermore, the sole question presented, according to the Court, was whether the district judge's order violated the eleventh amendment. *Id.* at 334, 59 L.Ed.2d at 362. Nevertheless, in the *Quern* opinion,

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[7] Congress has the power to abrogate the states' eleventh amendment immunity, especially when acting pursuant to its powers granted by the fourteenth amendment, which was adopted after the eleventh amendment and which explicitly limits states' rights. *Fitzpatrick v. Bitzer*, 427 U.S.445, 453-56, 49 L.Ed.2d 614, 620-21 (1976). Section 1983 was enacted primarily pursuant to Congress's powers under the fourteen amendment. *District of Columbia v. Carter*, 409 U.S. 418, 423, 34 L.Ed.2d 613, 619 (1973).

the majority used language broader than necessary to dispose of the eleventh amendment question presented:

> [W]e simply are unwilling to believe, on the basis of such slender 'evidence,' that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the States.

Quern, 440 U.S. at 341, 59 L.Ed.2d at 367 (Rehnquist, J.).[8] By using the phrase "traditional sovereign immunity" instead of "eleventh amendment immunity," the Court suggested that Congress did not intend states to be subject to section 1983 suits *at all*, as opposed to just not in federal court.

Perhaps for that reason, Justice Brennan did not join the majority opinion in *Quern*.[9] He characterized the majority opinion as "conclud[ing], in what is patently dicta, that a State is not a "person" for purposes of 42 USC § 1983 . . ." *Id.* at 350, 59 L.Ed.2d at 372 (Brennan, J., concurring, this portion with which Marshall, J., joined). He then argued that to do so was both unnecessary and wrong.

Justice Brennan's statement that the Court concluded that states are not "persons" under section 1983 is not undisputed. For example, Justice Rabinowitz, dissenting in *Green*, expressed the view that the *Quern* majority carefully avoided the issue. *Green*, 633 P.2d at 1382 (Rabinowitz, J.,

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[8] Then-Justice Rehnquist, author of the majority opinion in *Quern*, previously opposed an expansive reading of § 1983. *See, e.g., Monell*, 436 U.S. at 714-24, 56 L.Ed.2d 650-57 (Rehnquist, J., dissenting).

[9] Justice Brennan has been a leading advocate of an expansive reading of § 1983. *See, e.g., Maine v. Thiboutot*, 448 U.S. 1, 65 L.Ed.2d 555 (1980) (Brennan, J.) (holding that § 1983 applies to violations of any federal statute, not just equal rights legislation); Monell, 436 U.S. at 653, 56 L.Ed.2d at 611 (Brennan, J.)

dissenting). Similarly, in *Della Grotta v. Rhode Island*, 781 F.2d. 343, 348 n.6 (1st Cir. 1986), the First Circuit stated: "In *Quern*, the majority did not decide whether a state is a 'person' although challenged to do so by Justice Brennan in his concurrence."

However, as explained above, we remain convinced that the broad language of the majority opinion in *Quern* addresses the issue, albeit obliquely. Furthermore, even if *Quern* did not definitively hold that states are not "persons" subject to suit under section 1983, we see two reasons why that result follows from *Quern*.

First, we note that the Supreme Court has interpreted the word "person" in a variety of other contexts. Annotation, *Supreme Court's Views as to Meaning of Term "Person,", as Used in Statutory or Constitutional Provision,* 56 L.Ed.2d 895 (1978). The only clear consensus is that the word is not a term of art with a fixed meaning. *Id.* at 899. "Whether the term 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment." *Sims v. United States*, 359 U.S. 108, 112, 3 L.Ed.2d 667, 671 (1959).[10] Instead, courts must examine "[t]he purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute." *Pfizer Inc. v. India*, 434 U.S. 308, 313, 54 L.Ed.2d 563, 569

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[10] Examples of statues in which the Court construed "person" to embrace states include provision of the federal antitrust laws authorizing any "person" to recover treble damages for antitrust violations, *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261, 31 L.Ed.2d 184, 191-92 (1972); and provisions of the Internal Revenue Code imposing a special tax on "persons" that sell liquor wholesale, *Ohio v. Helvering*, 292 U.S. 360, 370, 78 L.Ed. 1307, 1310 (1934). In some statutes, the word "person" has even been construed to include the United States. *See Far East Conference V. United States*, 342 U.S. 570, 576, 96 L.Ed. 576, 583 (1952) (interpreting the Shipping Act of 1916).

(1978) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 605, 85 L.Ed. 1071, 1074-75 (1941)).

In examining the purpose and context of the enactment of the Civil Rights Act of 1871, we observe that, in 1871, Congress had not yet conferred federal question jurisdiction on federal courts.[11] When jurisdiction was lacking in the federal district courts, federal rights were vindicated in state courts with the potential for review by the United States Supreme Court. Dissatisfied with this reliance on state courts, during the Reconstruction Era following the Civil War, Congress passed the Civil Rights Act of 1871[12] and bestowed general federal question jurisdiction on lower federal courts several years later. As for the purpose of the Civil Rights Act of 1871, the Supreme Court has stated:

> With the growing awareness that this reliance [on state courts to vindicate federal rights] had been misplaced, . . . Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials.

District of Columbia v. Carter, 409 U.S. 418, 428, 34 L.Ed.2d 613, 622 (1973) (footnote omitted). In *Mitchum v. Foster*, 407 U.S. 225, 240-41, 32 L.Ed.2d 705, 716-17 (1972) (bracketed alterations in the original), the Court gave weight to remarks in the legislative history of the Civil Rights Act of 1871 which expressed that view:

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[11] Congress granted federal question jurisdiction to the federal courts in 1875. Act of March 3, 1875, ch. 137, § 1, 18 (part 3) Stat. 470.

[12] Section 1 of the Civil Rights Act of 1871 granted jurisdiction to the lower federal courts to hear § 1983 actions. This grant is now codified at 28 U.S.C. § 1343 (3) (1976).

> As Representative Lowe stated, the records of the [state] tribunals are searched in vain for evidence of effective redress [of federally secured rights] . . . . The case has arisen . . . when the Federal Government must resort to its own agencies to carry its own authority into execution. Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." Cong Globe, 42d Cong., 1st Sess., 374-376 (1871). This view was echoed by Senator Osborn: "If the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate. . . . We are driven by existing facts to provide for the several states in the South what they have been unable to fully provide for themselves; i.e., the full and complete administration of justice in the courts. And the courts with reference to which we legislate must be the United States courts." *Id.*, at 653.

The Court has concluded that "in the final analysis, § 1 of the 1871 act may be viewed as an effort 'to afford a federal right in federal courts . . . .'" *District of Columbia v. Carter*, 409 U.S. at 428, 34 L.Ed.2d at 623 (quoting *Monroe v. Pape*, 365 U.S. 167, 180, 5 L.Ed.2d 492, 501 (1961)).

The historical context and congressional purpose guide our interpretation of *Quern*, in which the Court held that Congress, by enacting section 1 of the Civil Rights Act of 1871, did not intend to subject states to suit in federal court by abrogating their eleventh amendment immunity. *Quern*, 440 U.S. at 340-42, 59 L.Ed.2d at 366-67. If section 1 was primarily designed to allow vindication of federal rights in federal courts, we believe it would have been anomalous for Congress to have precluded suits under the statute against states in

federal court but permitted such actions in *state* courts.[13] Therefore, it follows from *Quern* that states are not subject to suit under section 1983 in federal or state court.

A second reason this result follows from *Quern* is that much of the rationale in *Quern* which explains why states are not subject to section 1983 actions in federal court applies equally well to explain why states should not be subjected to section 1983 actions in any court. In particular, the Court found the word "person" too general, *Quern*, 440 U.S. at 341-43, 59 L.Ed.2d at 367-68, and the congressional debate on section 1 of the Act too scanty to warrant the conclusion that Congress intended to override traditional sovereign immunity:

> Given the importance of the States' traditional sovereign immunity, if in fact the Members of the 42d Congress believed that § 1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act. Instead, § 1 passed with only limited debate and not one member of congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting § 1. We can only conclude that this silence on the matter is itself a significant indication of the legislative intent of § 1.

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[13] See *Smith v. Department of Pub. Health*, 410 N.W.2d 749, 766 (Mich. 1987) (Brickley, J., concurring, this portion with which a majority of the justices joined), *cert. granted sub nom. Will v. Michigan Dep't of State Police*, ____U.S. ____, 99 L.Ed.2d 696 (Apr. 19, 1988).

Id. at 343, 59 L.Ed.2d at 368.[14] The relative lack of debate on this issue indicates an understanding at the time that the Act would not expose states to liability. We think this rationale serves to negate states' liability in state court as well as federal court. *See Smith*, 410 N.W.2d at 766; Zagrans, *"Under Color of What Law": A Reconstructed Model of Section 1983 Liability*, 71 Va.L.Rev. 499, 549-550 (1985). Therefore, we continue to believe our result in *Green* follows from *Quern*.

In decisions post-dating *Quern*, some courts have held that states *are* "persons" under section 1983.[15] However, the

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[14] This view of the legislative history is not undisputed. Justice Brennan, in his concurrence in *Quern*, saw it entirely differently. First, he observed that the fourteenth amendment on its face is directed at the states themselves, and not merely at state officers. *Quern*, 440 U.S. at 354-55, 59 L.Ed.2d at 375-76 (Brennan, J., concurring, this portion with which Marshall, J., joined). He then stated:

> It is logical to assume, therefore, that § 1983 in effectuating the provisions of the Amendment by "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights," is also addressed to the States themselves.

Id. at 355, 59L.Ed.2d at 376 (citation omitted). Finally, Justice Brennan gave several pointed examples from the recorded legislative history of congressmen who believed that § 1 of the Civil rights act of 1871, now § 1983, was aimed at states themselves in addition to state officials. The majority in *Quern* considered Justice Brennan's examples to be "occasional remarks" in the legislative history. *Quern*, 440 U.S. at 341, 59 L.Ed.2d at 366.

[15] See *Della Grotta v. Rhode Island*, 781 F.2d 343, 348 (1st Cir. 1986); *Meeker v. Addison*, 586 F.Supp. 216, 225 (S.D. Fla. 1984); *Harris v. Arizona Bd. of Regents*, 528 F.Supp. 987, 992 (D. Ariz. 1981); *Irwin v. Calhoun*, 522 F.Supp. 576, 583-84 (D. Mass. 1981); *Marrapese v. Rhode Island*, 500 F.Supp. 1207, 1212 (D.R.I. 1980).

majority view is that states are not "persons."[16] If the Supreme Court has not definitively resolved this controversy, neither has Congress. Although Senate bills were introduced in the 95th, 96th, and 97th Congresses that defined "person" to include states, those bills never passed.[17]

It is undisputed that the fourteenth amendment limits state sovereignty, and that Congress has the power to create causes of action under it against states. However, we need not conclude that Congress exercised that power, based only upon the general term "person" and the debatable legislative history of the Civil Rights Act of 1871. We perceive no convincing arguments based either on Supreme Court precedent, the text of § 1983, or its legislative history, that compel us to overturn our decision in *State v. Green* that states are not persons under section 1983. Therefore, we uphold the superior court's grant of summary judgment to the State on the section 1983 action.

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16 *Ruiz v. Estelle*, 679 F.2d 1115, 1137, *modified on other grounds*, 688 F.2d 266 (5th Cir. 1982) *cert. denied*, 460 U.S. 1042, 75 L.Ed.2d 795 (1983); *Aubuchon v. Missouri*, 631 F.2d 581, 582 (8th Cir. 1980), *cert. denied*, 450 U.S. 915, 67 L.Ed.2d 341 (1981); *Coffin v. South Carolina Dep't of Social Servs.*, 562 F.Supp. 579, 585 (D.S.C. 1983); *Florida Businessmen for Free Enter. v. Florida*, 499 F.Supp. 346, 350 (N.D. Fla. 1980); *Merritt for Merritt v. Idaho*, 696 P.2d 871 (Idaho 1985); *Woodbridge v. Worcester State Hosp.*, 423 N.E.2d 782, 786 n.7 (Mass.1981); *Smith v. Department of Publ Health*, 410 N.W.2d 749, 750 (Mich.1987), *cert. granted sub nom. Will v. Michigan Dep't of State Police*, ___ U.S.____, 99 L.Ed.2d 696 (April 19, 1988); *Edgar v. Washington*, 595 P.2d 534, 537 (Wash. 1979), *cert. denied*, 444 U.S. 1077, 62 L.Ed.2d 760 (1980); *Boldt v. Wisconsin*, 305 N.W.2d 133, 143-44 (Wis.), *cert. denied*, 454 U.S. 973, 70 L.Ed.2d 393 (1981).

17 S. 990, 97th Cong., 1st Sess. § 2(2) (b) (1981); S. 1983, 96th Cong., 1st Sess. § 2(2) (1977); *see also* Sagafi-Nejad, *Proposed Amendments to Section 1983 Introduced in the Senate*, 27 St. Louis U.L.J. 373, 373-376 (1983).

B. *The action for damages against the State arising directly under the federal Constitution.*

In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 389, 29 L.Ed.2d 619, 622 (1971), the Supreme Court held that a violation of the fourth amendment by a federal agent acting under color of his authority gave rise to a cause of action for damages directly under the constitution, even though no such action had been provided by statute.[18] By analogy, Vest seeks damages against the State directly under the fourteenth amendment's equal protection clause.

The superior court granted summary judgment to the State on Vest's *Bivens*-type claim on the ground that Alaska's statutory sovereign immunity barred the suit. As an alternative holding, the court also explained that a *Bivens*-type damage remedy should not be allowed under the circumstances of this case. We affirm the summary judgment on the ground that a *Bivens*-type damage remedy is inappropriate in this case. We do not reach the sovereign immunity question.

When a court finds a statute unconstitutional, the traditional remedy is declaratory or injunctive relief. Professor Davis stated: "Neither the United States nor any state has ever been liable for damages because its legislative body has enacted legislation that is later held unconstitutional."[19] K.

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[18] The three dissenters believed that by creating such a damage action, the Court improperly encroached on Congress's power to legislate. *Bivens*, 403 U.S. at 411-12, 427-28, 430, 29 L.Ed.2d at 636, 645, 646 (separate dissents of Burger, C.J., Black, J., and Blackmun, J.).

[19] *See also HFH, Ltd. v. Superior Court of Los Angeles County*, 542 P.2d 237, 245 (Cal. 1975), *cert. denied*, 425 U.S. 904, 47 L.Ed.2d 754 (1976) ("both constitutional and institutional understandings require that legislative acts, even if improper, find their judicial remedy in the undoing of the wrongful legislation, not in money damages against the (Footnote Continued)

Davis, *Administrative Law Treatise* § 25.00-4 at 400 (Supp. 1982).[20] For a court to hold a state liable for unconstitutional legislation would introduce a profound conservative tilt into the lawmaking process. Legislators would become reluctant to legislate, knowing that money damages were at stake if a court ultimately disagrees with their own appraisal of the constitutionality of a bill.[21]

Nevertheless, we must examine whether federal law requires us to assess damages in this case. In the *Bivens* line of cases, the Supreme Court has repeatedly held that, when a constitutional right has been violated by a federal agent, the lack of statutory remedy does not bar federal courts from ordering monetary relief. *See Bush v. Lucas*, 462 U.S. 367, 378, 76 L.Ed.2d 648, 657 (1983); *Carlson v. Green*, 446 U.S. 14, 19, 64 L.Ed.2d 15, 24, (1980) (*Bivens*-type action even where Congress had provided a remedy; *Davis v.*

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state"). *But see Osterndorf v. Turner*, 426 So.2d 539, 545 (Fla. 1982) (after invalidating a difference in state tax treatment that was based on length of residency, Florida's highest court granted a refund of past taxes to the litigants who challenged the statute).

We also note that this discussion is about judicially-created remedies, in the absence of statutes allowing or requiring damages against states. When Congress has created a damage remedy against states, the courts will implement it. For example, in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 49 L.Ed.2d 614 (1976), the Court reversed a district court's refusal on eleventh amendment grounds to award damages, in the form of retroactive benefits, for state legislation that violated Title VII of the Civil Rights Act of 1964. The Court's reason was that Title VII, which prohibits sex-based employment discrimination, includes a congressional authorization of damages against states. *Id.* at 448-50 nn.1-5, 456-57, 49 L.Ed.2d at 617-18 nn. 1-5, 621-22.

20 The quoted sentence was in a case discussion not included in corresponding sections 27.37-.40 of K. Davis, *Administrative Law Treatise* (2d ed. 1984).

21 Since the legislators have absolute immunity, it is not their personal funds that would be at risk. Rather, at risk are the State's funds, over which the legislators have control. *See* Alaska Const. art. IX, § 13.

Passman, 442 U.S. 228, 60 L.Ed.2d 846 (1979) (*Bivens*-type action against federal agents to vindicate fifth amendment equal protection rights). In fact, federal courts *must* order that relief, where appropriate. As the Supreme Court has summarized:

> *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.

Carlson, 446 U.S. at 18-19, 64 L.Ed.2d at 23.

Without deciding the issue, we will assume in this case that the federal Constitution requires state courts to award monetary damages under circumstances in which it would be appropriate under the *Bivens* line for a federal court to award damages.[22] However, those circumstances have not yet

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[22] However, not only has the Supreme Court not yet resolved whether state courts must hear federal *Bivens*-type actions, but it has not even resolved whether state courts must hear § 1983 actions. *See Maine v. Thiboutot*, 448 U.S. 1, 3 n.1, 65 L.Ed.2d 555, 558 n.1 (1980). *Cf. Testa v. Katt*, 330 U.S. 386, 389-91, 91 L.Ed. 967, 969-70 (1947) (state courts must enforce federal Emergency Price control Act, in which Congress provided that wronged buyers may sue seller in any court of competent jurisdiction).
(Footnote Continued)

included suits such as the one now before this court.[23] Vest's action lies within the intersection of two overlapping categories of suits, in neither of which the Supreme Court has yet recognized *Bivens*-type remedies: actions against states, and actions under the fourteenth amendment.[24] However, we do not imply that the mere lack of federal precedent establishes the impropriety of a *Bivens*-type action such as the present one.

We first analyze *Bivens*-type actions against a state. One reason why no federal precedent exists is that most such claims would be barred in federal court by the eleventh amendment as currently interpreted.[25]

The assumption that state courts (with Supreme Court Review) will adequately protect federal rights was one side of the debate about whether the Constitution should be written to provide for lower federal courts. The framers ultimately adopted a compromise, allowing but not mandating the existence of lower courts. *See* U.S. Const. art. III, § 1; H. Hart & H. Wechsler, *The Federal Courts and the Federal System* 11-12 (P. Bator, P. Mishkin, D. Shapiro & H. Wechsler 2d ed. 1973).

[23] We have found no *Bivens*-type case at the Supreme Court level other than those against federal agents acting under color of their authority. Thus, *Bivens*-type actions have served as a complement to § 1983 actions against state agents. Federal agents are not subject to suit under § 1983.

[24] *Bivens* was an action for an alleged violation of the fourth amendment. 403 U.S. at 389, 29 L.Ed.2d at 622. *Davis* was under the fifth amendment, 442 U.S. at 230, 60 L.Ed.2d at 853; *Carlson*, the eight amendment, 446 U.S. at 19, 64 L.Ed.2d at 24; and *Bush*, the first amendment, 462 U.S. at 368, 76 L.Ed.2d at 651.

[25] Such a claim against a state would be allowed in federal court only if the state consented to be sued. However, this view of the eleventh amendment has spawned considerable argument. *See e.g.*, Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 Harv. L. Rev. 61, 68 (1984); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. Pa. L. Rev. 1203, 1261-78 (1978). Four justices sharply disagree with the Supreme Court's present construction of the eleventh amendment. Their view, as expressed in *Atascadero State* (Footnote Continued)

Even if a state waived its eleventh amendment immunity, it is unlikely that federal courts would create a *Bivens*-type remedy against a state. As already noted, the Supreme Court has stated that *Bivens*-type actions are inappropriate where there are "special factors counselling hesitation in the absence of affirmative action by Congress." *Carlson*, 446 U.S. at 18, 64 L.Ed.2d at 23, (citations omitted). Such special factors have included questions of federal fiscal policy;[26] the demands of military discipline added to the express constitutional grant to Congress of authority over the military;[27] and suits against members of Congress, who "enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate."[28]

Hospital v. Scanlon, 473 U.S. 234, 247, 301, 87 L.Ed.2d 171, 183, 217 (1985) (Brennan, J. dissenting, joined by Marshall, Blackmun, and Stevens, JJ.), is that the eleventh amendment is nothing more than a limitation on party-based jurisdiction (e.g., diversity jurisdiction); as such it has no effect on federal question jurisdiction of federal courts. If the eleventh amendment were re-interpreted this way, it would not bar *Bivens*-type claims against states from being raised in federal court. Justice Scalia's view is not yet known, *see Welch v. State, Dep't of Highways & Pub. Transp.*, 483 U.S.___, ___, 97 L.Ed.2d 389, 411 (1987) (Scalia, J., concurring, was unwilling to reach the possible re-interpretation of the eleventh amendment because the "presentation focused on other matters"), nor is that of Justice Kennedy.

[26] *See Bush*, 462 U.S. at 376, 76 L.Ed.2d at 646 (citing *United States v. Standard Oil Co.*, 332 U.S. 301, 311, 91 L.Ed. 2067, 2073 (1947)).

[27] *Chappell v. Wallace*, 462 U.S. 296, 301-04, 76 L.Ed.2d 586, 591-93 (1983).

[28] See *Carlson*, 446 U.S. at 19, 64 L.Ed.2d at 24 citing *Davis*, 442 U.S. at 246, 60 L.Ed.2d at 863 (in which, in spite of the special factor counselling hesitation, the Court found a *Bivens* action could be maintained against a Congressman, if his allegedly-unconstitutional actions were outside the protection afforded by the speech or debate clause).

States also enjoy such independent status in our constitutional scheme. Judicially created remedies would be similarly inappropriate against them because Congress, where the states are represented, is in a better position than the federal judiciary to weigh the competing policies implicated in creating an entirely novel damage remedy against states.[29, 30]

The second category of *Bivens*-type suit that the Supreme Court has not yet recognized consists of suits under the fourteenth amendment. The Supreme Court was faced with the question of whether to recognize such a suit against a school board in *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471 (1977) (since this case was pre-*Monell*, the school board could not be sued directly under § 1983). The court thought the question was "extremely

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[29] In *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 83 L.Ed.2d 1016 (1985), the Supreme Court determined that no islands of state sovereignty are judicially protected from the reach of Congress's commerce clause powers. The Court emphasized that the framers of the Constitution envisioned that Congress itself, made up of representatives of states, would adequately protect states' residual sovereignty. *Id.* at 550-52, 83 L.Ed.2d at 1033-34. The Court explained: "We continue to recognize that the States occupy a special and specific position in our constitutional system . . . . The political process ensures that laws that unduly burden the States will not be promulgated."

[30] Two justices of the Michigan Supreme Court posited a separate reason why *Bivens*-type remedies would be inappropriate against states:

> In *Carlson, supra*, the Supreme Court noted that a *Bivens* remedy not only compensated victims, but also acted as a deterrent to unconstitutional activity by federal officials. However, making governmental bodies, as opposed to individual officials, liable for damages for constitutional violations lessens the deterrent effect of a *Bivens*-style remedy.

Smith, 410 N.W.2d at 789 (Brickley, J., concurring, joined by Riley, C. J.).

important," yet avoided answering it.[31] *Id.* at 278, 50 L.Ed.2d at 478. In addition to the concerns to which we alluded above -- separation of powers (within the federal government) and federalism -- it appears to us that the structure of the fourteenth amendment itself militates against such *Bivens*-type remedies. Section 5 of the amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. While section 5 does not give exclusive power to Congress at the expense of the judiciary, we view it as a thumb on the scale, tipping the balance toward greater deference to Congressional judgment regarding appropriate remedies.[32] For these reasons, when Congress has not spoken, we conclude that federal courts would not

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[31] The Court stated:

> The question of whether the Board's arguments [that the Board was not a "person" under § 1983] should prevail, or whether as respondent urged in oral argument, we should, by analogy to our decision in *Bivens v. Six Unknown Fed. Narcotics Agents*, imply a cause of action directly from the Fourteenth Amendment which would not be subject to the limitations contained in § 1983, is one which has never been decided by this Court. Counsel for respondent at oral argument suggested that it is an extremely important question and one which should not be decided on this record. We agree with respondent.

Mt. Healthy, 429 U.S. at 278, 50 L.Ed.2d at 478 (citation omitted). It appears that the Supreme Court has not answered this question since then.

[32] None of the other constitutional amendments (e.g., 1st, 4th, 5th, 8th) under which other *Bivens*-type claims have been allowed by the Court have contained this express grant of power to Congress.

create a constitutional damage remedy in a suit under the fourteenth amendment and against a state.[33]

The question remains whether the Constitution requires *state* courts to create a remedy prohibited in federal court.[34] The decision whether to imply a damage remedy for constitutional violations is a policy determination -- in this case, federal policy. We believe the nation has as much interest in the continuing vitality of a state's legislative process as does the state itself. Justice Brandeis envisioned that each state may "serve as a laboratory" for social and economic change: "Denial of the right to experiment may be fraught with serious consequences to the Nation." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 76 L.Ed. 747, 771 (1932) (Brandeis, J., dissenting).[35] It would be poor federal policy to require state judiciaries, in the absence of congressional mandate, to impose damages for unconstitutional state legislation. We hold that a *Bivens*-type action, brought in state court against the State, cannot be allowed to stand when it is grounded on a claim that the legislature enacted a law later found to violate the equal protection clause of the fourteenth

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[33] We do not imply that a *Bivens*-type action would be allowed if the suit were only against a state, or only under the fourteen amendment, but not both.

[34] There are many situations in which federal courts are required to defer to state courts. Examples of such rules include the eleventh amendment; the Tax Injunction Act, 50 Stat. 738, now 28 U.S.C. § 1341; and *Younger v. Harris* abstention, *see Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669 (1971). One underlying motivation behind these rules is to reduce friction in federal-state relations. In the present case, *Bivens*-type remedies against states would presumably lead to less federal-state friction if created by state courts than if created by federal courts.

[35] Brandeis's notion of states as laboratories was expressed in a dissent, but is now often repeated in majority opinions. *See, e.g., Garcia*, 469 U.S. at 546, 83 L.Ed.2d at 1031.

amendment of the Constitution.[36] Therefore, we uphold the superior court's grant of summary judgment to the State on the *Bivens*-type action under the federal Constitution.

C. *The action for damages against the State, arising directly under the Alaska Constitution*

Vest argues that he is entitled to an award of damages under the equal protection clause of the Alaska Constitution. This is analogous to *Bivens*-style relief under the federal Constitution.[37]

The superior court, in its memorandum of decision, assumed (without deciding) that Alaska law allows *Bivens*-type actions under the state constitution. It then disposed of the state *Bivens*-type claims at the same time as the federal *Bivens* claims, principally on sovereign immunity grounds but also on the ground that a *Bivens*-type remedy is inappropriate in this case.

This court was asked to recognize *Bivens*-type damage remedies arising directly under the state constitution in several previous cases. *See Walt v. State*, 751 P.2d 1345, 1353 (Alaska 1988); *State v. Haley*, 687 P.2d 305, 317-18 (Alaska 1984); *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 275 (Alaska 1984); *King v. Alaska State Hous. Auth.*,

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[36] We do not decide that unconstitutional behavior of any type can never give rise to a federal *Bivens*-type of action against the State in state court.

[37] Vest did not sue under AS 09.50.250 (entitled "Actionable claims against the state"). He seeks damages for the enactment and execution of the Longevity Bonus Program, neither of which would be allowed under AS 09.50.250. *Cf. Division of Corrections v. Neakok*, 721 P.2d 1121, 1132-33 (Alaska 1986) (decisions involving "basic planning or policy formulation will be considered discretionary," and will be immune under AS 09.50.250).

633 P.2d 256, 259-61 (Alaska 1981). In none of these four cases did we resolve whether such actions can exist.[38]

We do not resolve this question in this case because Vest's claim would be inappropriate for a *Bivens*-type action.[39] As already discussed, we do not believe it proper for the judiciary to assess damages against the State on the ground that the legislature enacted a law later held unconstitutional, in the absence of a statute allowing or requiring such damages.[40]

III. DAMAGES AGAINST SCHAFER IN HER OFFICIAL CAPACITY

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[38] In *Walt*, we decided that the factual context made a *Bivens*-type action under the state constitution inappropriate. In particular, the legislature had already provided for an administrative remedial system. 751 P.2d at 1353. In *Haley*, we found that the legislature had already created a cause of action under AS 09.50.250. 687 P.2d at 317-18. We decided *Alaska Pacific Assurance Co.* on other grounds In *King*, we held that a *Bivens*-type action was inappropriate in that case because of "special factors counselling hesitation" in creating a damages remedy for a constitutional violation. *King*, 633 P.2d at 259-60.

Some other states have recognized *Bivens*-type actions under their constitutions. *See Widgeon V. Eastern Shore Hospital Center*, 479 A.2d 921 (Md. 1984); *Smith v. Department of Pub. Health*, 410 N.W.2d 749, 751 (Mich. 1987). For a more lengthy discussion of *Bivens*-type actions in other states, see id. at 796 (Boyle, J., concurring in part and dissenting in part, joined by Cavanaugh, J.).

[39] Consequently, we do not reach whether the State has sovereign immunity from such a suit.

[40] Furthermore, the state constitution provides that "[t]he legislature shall establish procedures for suits against the State." Alaska Const. art. II, § 21. One plausible interpretation of this clause is that it delegates to the legislature the exclusive authority to create remedies in suits against the State. If so, judicially created damage remedies against the State would be prohibited. Since the parties have not argued this point, we need not resolve it.

Under section 1983, a damage suit against a state agent in her official capacity is treated as a suit against the state itself. The Supreme Court unanimously stated:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

Kentucky v. Graham, 473 U.S. 159, 165-66, 87 L.Ed.2d 114, 121 (1985) (citations and footnote omitted; emphasis in original).[41]

For that reason, we need not separately entertain the portion of Vest's section 1983 suit against Schafer in her official capacity. It is a suit against the State, which, as we have just reaffirmed, is not permitted under section 1983.

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41 Although *Kentucky* arose in federal court, the portion of the opinion regarding official-capacity suits does not seem to depend on eleventh amendment considerations. It appears that the Court was pronouncing the law of § 1983 actions in general, not just § 1983 actions in federal court.

Similarly, we see no reason to treat a federal *Bivens*-type official-capacity claim differently from a suit against the State. Nor do we see any reason that state law should be any different than federal law in this regard. Thus, all of Vest's claims against Schafer in her official capacity are claims against the State. As we have just held, none of those claims against the State can stand.

IV. DAMAGES AGAINST SCHAFER IN HER PERSONAL CAPACITY.

The superior court granted summary judgment to Schafer in her personal capacity on the ground that she was protected by qualified immunity for her official acts. In arriving at that conclusion, the court determined that Schafer had not violated clearly established constitutional law in administering the Longevity Bonus Program. We do not reach the issue of qualified immunity,[42] because we find that Schafer in her personal capacity is not a proper defendant in this action.[43]

Vest's complaint and amended complaint in this action do not specify whether Schafer was sued personally, officially, or both.[44] In this situation, " '[t]he course of proceedings' . . . typically will indicate the nature of the liability sought to be imposed." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14, 87

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[42] This court may affirm a summary judgment on grounds different from those advance by the trial court. *Breck v. Ulmer*, 745 P.2d 66, 71 n.10 (Alaska 1987).

[43] The cases discussed in this section were decided under federal law. However, for the same reasons, we find that Schafer is not a proper defendant for purposes of Vest's state claims as well.

[44] At the time the superior court granted summary judgment to the defendants, the State of Alaska had moved to dismiss all claims against Schafer in her personal capacity. The court never ruled on that motion, which was rendered moot by the issuance of summary judgment.

L.Ed.2d 114, 122 n.14 (1985) (quoting *Brandon v. Holt*, 469 U.S. 464, 469, 83 L.Ed.2d 878, 884 (1985)).

One facet of this determination is whether the State is the "real party in interest." *Kentucky*, 473 U.S. at 166, 87 L.Ed.2d at 121. The Eleventh Circuit stated: "Whether a state officer is being sued for damages in an official or an individual capacity is not mere semantics; the question is whether the plaintiff is reasonably seeking relief from the state coffers or from the individual's assets." *Gamble v. Florida Dep't of Health and Rehabilitative Servs.*, 779 F.2d 1509, 1513 (11th Cir. 1986) (footnote omitted). Accordingly, if a plaintiff prevails in a damage suit against a state agent personally, the "award of damages . . . can be executed only against the official's personal assets . . . ." *Kentucky*, 473 U.S. at 166, 87 L.ed.2d at 121.

We have little doubt that Vest and the plaintiff class do not expect to collect from Schafer's personal funds the huge award they seek. Nor, it seems to us, can Vest expect to collect a personal judgment against Schafer from the State under a respondeat superior theory. To hold the State vicariously liable would violate the prohibition against exacting relief from the State in personal capacity suits. However, Vest specifically argues that he seeks relief from liability insurance Schafer might carry, from indemnification agreements Schafer may have with the State, and from any official bond Schafer may have (e.g., pursuant to AS 39.05.050 and AS 39.15.010-.100). With the possible exception of indemnification agreements,[45] these are permissible sources of relief in a personal capacity suit.

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[45] It is not settled whether seeking relief through such an indemnification agreement makes the State the real party in interest. In the analogous eleventh amendment context, the Supreme Court (Footnote Continued)

We believe that a second, less developed, facet of the determination whether a claim is against a state agent personally or against the state itself is whether there is wrongful individual action. In *Ford Motor Co. v. Department of Treasury of the State of Indiana*, 323 U.S. 459, 462, 89 L.Ed. 389, 393 (1945), an eleventh amendment case, the Supreme Court unanimously stated: "Where relief is sought . . . from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally." Since the present suit is not in federal court, it does not directly involve the eleventh amendment. However, just as it is necessary to determine whether a suit is against the state or a state officer in actions involving the eleventh amendment, so it is necessary in § 1983 and *Bivens*-type actions. We see little reason for the test to be different in the three contexts.

In this appeal, Vest argues that Schafer's individual actions were wrongful:

> The fact that an official failed to consult legal authority before engaging in questionable conduct, as Schafer asserts is the case here, weighs against a finding that

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determined that a state was the real party in interest in *Edelman v. Jordan*, 415 U.S. at 664, 39 L.Ed.2d at 673, stating: "These funds will obviously not be paid out of the pocket of petitioner Edelman." This sentence might be stretched to suggest a rule that if a state volunteers to indemnify a defendant in a damage suit, the suit is really against the state. Professor Tribe argues against such a rule: "[A] state should not be able to turn a purely intramural arrangement with its officers into an extension of sovereign immunity." L. Tribe, *American Constitutional Law* § 3-25, at 177 n.24 (2d ed. 1988).

> the official's conduct was reasonable . . . Schafer failed, by her own admission,[46] to act reasonably . .

(Footnote added.)

We do not consider Schafer's failure to consult legal authority to be wrongful. In administering the Longevity Bonus Program, she acted in precise compliance with legislative mandates, causing bonuses to be issued only to those who were eligible under the statutes. A government agent, in assessing the legality of her duties, should be entitled to give great weight to the vote of a majority of the legislators who themselves swore to uphold the Constitution. We find no duty on the part of government agents, when acting in their ministerial capacity to execute the letter of the law, to consult legal authority.

Nor do we find a duty among such agents to seek declaratory judgment. Imposing such a duty would only

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46 The "admission" to which Vest refers is evidently an argument Schafer made in the superior court in her Motion to Dismiss Claims Against Marian Schafer In Her Personal Capacity:

> Had Mrs. Schafer any reason to believe that she might be personally liable for damages of this magnitude, it is certainly reasonable to conjecture that she might have taken some sort of action, such as engaging her own attorney to assess the validity of the claim. Had she received advice that the claim even arguably had merit, she would have had several options to consider. She might have refused to implement the Longevity Bonus Program, quit her job, sought an opinion from the attorney general as to the propriety of continuing to enforce the statute, or moved for a declaratory judgment.

However, Schafer's statement can scarcely be regarded as an "admission" that she acted unreasonably. She admitted only that it was "reasonable to conjecture" what actions she might have taken.

encourage government employees to test all their job responsibilities in court, at pain of personal liability.

Nor did Schafer have a duty to quit her job, or refuse to discharge the ministerial duties with which she had been charged by statute. This is not to say that such a duty can never arise. We think it can, but only where the egregiousness of the State's directive is far more manifest than it was in this case. To require disobedience on the part of government employees whenever their personal assessment of an enactment differs from that of the legislature would accomplish little other than creating chaos in government.

The allegations in the complaint and the facts in the record do not support the imposition of personal liability on Schafer. The essence of Vest's lawsuit is a challenge of state statutes, not a challenge of Schafer's behavior.[47] For this reason, we affirm the superior court's dismissal of Vest's damage claims against Schafer.

AFFIRMED

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[47] Other holdings along these lines are scarce. In *Rosado v. Wyman*, 414 F.2d 170 (2d Cir. 1969), *rev'd on other grounds*, 397 U.S. 397, 25 L.Ed.2d 442 (1970), the plaintiff class sued the New York Commissioner of Social Services in his official and personal capacities, claiming that a New York welfare law violated the Social Security Act. The court stated:

> Since the suit here constitutes an attack on a state statute, and not an action taken under it, the plaintiffs' complaint is against the state and not against the Commissioner as an individual. He . . . is therefore not within the scope of Section 1983.

414 F.2d at 178 (without further discussion on this point).

Appendix B

Alaska Longevity Bonus Act

Source: FCCS HCS CSSB 211. Offered 6/12/72. Adopted at § 1 Ch 205 SLA 1972

A BILL

For an Act entitled: "An Act providing for an Alaska longevity bonus; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

Section 1. AS 47 is amended by adding a new chapter to read:

CHAPTER 45. ALASKA LONGEVITY BONUS

Sec. 47.45.010. Persons who may qualify for longevity bonus. (a) A person who is 65 years of age or over, who was domiciled in the territory on or before January 3, 1959 and who has maintained a continuous domicile in the territory or state for 25 years may apply to the commissioner of administration for qualification to receive a monthly bonus of $100.

(b) When the Commissioner of administration determines that an applicant qualifies under this chapter he shall immediately begin payment of the bonus.

(c) A person who otherwise qualifies to receive a bonus provided for in this chapter may continue to do so only as long as he continuously retains a domicile in the state.

Sec. 47.45.020. Continuous eligibility procedures. After qualification, monthly applications for bonuses may be made in person to any office of the Department of Administration. Mailed monthly applications shall also be considered by the Department of Administration. In-person or mailed applications shall be made on forms provided by the Department of Administration and shall conform to the conditions as provided by regulation. The commissioner may make exceptions for those residents who are isolated in rural areas and cannot mail a monthly application; however, they shall mail an application at least once every six months.

Sec. 47.45.030. Absence from the state. A recipient shall notify the commissioner of administration when he expects to be absent from the state if the absence is for a continuous period that exceeds 30 days. After that notification, the recipient shall no longer receive bonuses from the Department of Administration after his last regularly approved monthly application. Upon his return to the state he may again make application for a bonus. Whenever the absence is for a continuous period that exceeds 180 days the recipient shall be disqualified from receiving bonuses for the next 12 calendar months after his return to the state. However, when the commissioner of administration determines a period of absence is beyond the control of the recipient, he may not be disqualified, if he still otherwise qualifies upon his return to the state. Continual absences from the state, even though reported, and failure to notify the commissioner of an expected absence may be grounds for disqualification.

Sec. 47.45.040. Disqualification. Disqualification under this chapter shall rest solely with the commissioner of administration and shall be outlined in the regulations promulgated under sec. 100 (1) of this chapter.

Sec. 47.45.050. Department hearing. The Department of Administration may hold a departmental hearing upon the request of an applicant or recipient who has been disqualified. Previous to this hearing the department shall by certified mail notify an applicant or recipient in plain and comprehensive language the exact reason for his disqualification. Form letters using only referral to state statutes or department regulations, or otherwise vague in detail, shall not be considered compliance by the department with this section.

Sec. 47.45.060. Legal remedy. Legal remedy from disqualification may be sought by an applicant or recipient in any court of competent jurisdiction in the state. The burden of proof shall rest solely upon the applicant or recipient and any costs related to a disqualification verdict determined against the applicant or recipient may be recoverable by the attorney general from that person, or from any agency representing that person supported in whole, or in part, with state appropriations.

Sec. 47.45.070. Unqualified persons. An unqualified person is one who

(1) does not meet the age or residence requirements as provided for under this chapter;

(2) meets the age and residence requirements of this chapter but is confined in a state or federal mental health institution or facility and is certified by the state as unable to manage his own affairs; however, if that person, at the time of his commitment, provided the principal support of a spouse, the commissioner of administration may determine to pay the confined person's bonus to his spouse until the spouse is qualified for a bonus;

(3) is otherwise qualified but confined in a penal or correctional institution or facility; upon completion of sentence

or upon the conferral of a pardon, parole or probation, the person may make application; confinement outside the state shall be considered as residence in the state if a person was convicted and sentenced from a court in Alaska; revocation of parole or probation shall be cause for immediate disqualification until release from confinement is again effected;

(4) leaves the state of his own volition and remains absent from the state for a continuous period of more that 180 days.

Sec. 47.45.080. Accrual of bonuses. No recipient may, for any reason, receive an accrual of bonuses in excess of two monthly payments. No interest may be paid on accrued bonuses. Upon the death of a recipient the commissioner of administration shall pay to the beneficiary of the recipient any accrued bonuses not to exceed two monthly payments.

Sec. 47.45.090. Alaska longevity bonus fund.

(a) There is the Alaska longevity bonus fund created for the purpose of paying the monthly bonuses provided for in this chapter. The fund consists of all money made available by appropriations of the state legislature, and from other appropriated funds, all contributions from whatever source, and income and interest derived from the investment of money.

(b) The commissioner of administration is the administrator of the fund.

Sec. 47.45.100. Powers and duties of the administrator. The commissioner of administration shall

(1) promulgate regulations necessary to carry out the provisions of this chapter;

(2) make expenditures from the fund necessary to administer this chapter;

(4) publish annually a report showing the financial condition of the fund.

Sec. 47.45.110 Custody of funds. The commissioner of revenue is the treasurer of the system and has powers and duties for this purpose including but not limited to the following:

(1) to act as official custodian of the cash and securities belonging to the fund;

(2) to receive all items of cash belonging to the fund.

Sec. 47.45.120. Exemption from taxation and process. Bonuses received under this chapter are exempt from all state and political subdivision taxes except sales and use taxes and are not subject to execution, attachment, garnishment or other process. No bonus received under this chapter may be exempt from a federal tax requirement.

Sec. 47.45.130 Death or cessation of residency. The commissioner of administration shall establish procedures to stop a bonus when a recipient under this chapter no longer qualifies. When a recipient dies or discontinues his residency in the state his qualification for a bonus shall stop at the time of his last approved monthly application.

Sec. 47.45.140. Penalty for false statements. A person who wilfully or knowingly makes a false statement, or falsifies or permits to be falsified any record required by this chapter, is guilty of a misdemeanor and, upon conviction, is punishable by a fine of not more than $500, or by imprisonment for not more than six months, or by both, forfeits all rights under this chapter, and shall make adequate restitution for any bonuses illegally received.

Sec. 47.45.150. Definitions. In this chapter

Sec. 47.45.150. Definitions. In this chapter

(1) "bonus" means a monthly Alaska longevity bonus payment made to a person or his beneficiary who qualifies under this chapter;

(2) "domicile" means the place with which a person has a settled connection for determination of his civil status or other legal purposes because it is actually or legally his permanent and principal home.

Sec. 47.45.160. Applicability of Administrative Procedure Act. The Administrative Procedure Act (AS 44.62) does not apply to this chapter.

Sec. 47.45.170. Purpose. The sole purpose of this chapter is to offer and provide all law-abiding Alaskans capable of managing their own affairs who have maintained a domicile in the state for at least 25 years and have reached a retirement age of 65, an incentive to continue uninterrupted residency in the state. Under no circumstances shall this chapter be considered a form, type, or manner, of public relief. Bonuses made under this chapter are not predicated on need even though they may appear to provide supplemental income to some qualified persons who would otherwise be forced to become responsibilities of the state. The legislature further finds and states that this legislation recognizes the economic hardships suffered by many elderly Alaskans, Alaskans who through their tenacity and perseverance molded Alaska as we know it through skillful application of their talents. These pioneers are the same Alaskans, who in the prime of their life were in effect treated as second-class citizens by the federal government and who paid much of their hard-earned income to a government in which they did not have the right to participate through the power of the ballot. The legislature also is aware of the fact that many of these pioneers have been forced to live out their retirement years in areas far away from the land they loved and nurtured and

their own kin, an experience that is sad and frustrating to them as well as depriving new generations of Alaskans of the benefits of their wisdom and experience. This legislation hopefully will provide our pioneers with the economic means to remain in and continue to serve their state and to enjoy the opportunity of aiding the new Alaskan in making this state truly "The Great Land."

Sec. 2. AS 01.10.030 does not apply to this Act. If any provision of this act, or the application of a provision of this act to any person or circumstance is held invalid, this entire Act shall be considered invalid.

Sec. 3. This Act takes effect January 1, 1973.

Supreme Court, U.S.
FILED
NOV 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-447

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RODNEY G. VEST,

Petitioner,

vs.

MARIAN SCHAFER and STATE OF ALASKA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALASKA

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Is a state a "person" subject to suit for damages under 42 U.S.C. § 1983?

II. Should the rationale of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), be extended to create a cause of action for damages against a state for the enactment and execution of a state law that is subsequently declared void under the Fourteenth Amendment to the United States Constitution?

III. Is the Alaska Supreme Court correct that a state official is not subject to suit for damages in her personal capacity, where she merely executed a state law before it was declared unconstitutional by a court, and where she had not engaged in any wrongful individual action?

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No. 88-447

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

RODNEY G. VEST,

Petitioner,

vs.

MARIAN SCHAFER and STATE OF ALASKA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALASKA

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Alaska Supreme Court opinion which is the subject of the instant petition for writ of certiorari has been published in the official reporter as Vest v. Schafer, 757 P.2d 588 (Alaska 1988). An excerpt of the superior court decision below is reproduced in Appendix C herein.

STATEMENT OF THE CASE

In 1972 the Alaska Legislature enacted a bill known as the Longevity Bonus Act. Section 1, ch. 205, SLA 1972; codified at AS 47.45.010 -- 47.45.170; see App. B. The Act created a program of monthly stipends to pioneer Alaskans over the age of 65, who were domiciled in the state at statehood and had been residents for at least 25 years. AS 47.45.010; App. B1. The stated purpose of the Act was to provide an incentive to qualifying individuals to "continue uninterrupted residency in the state." AS 47.45.170; App. B6-7. The legislature recognized these individuals as the pioneers who "through their tenacity and perseverance molded Alaska as we know it," and who had been treated by the federal government in effect as "second-class citizens" before

statehood. Id. Acknowledging that many of these pioneers were forced to spend their retirement years away from Alaska, the legislature expressed its hope that a monthly stipend would provide the economic means for many to remain in the state and share their wisdom and experience with new generations of Alaskans. Id.

The Longevity Bonus Program was explicitly not created as an entitlement program based on need. "Under no circumstances shall this chapter be considered a form, type, or manner, of public relief. Bonuses made under this chapter are not predicated on need even though they may appear to provide supplemental income to some qualified persons who would otherwise be forced to become responsibilities of the state." Id.

At the time the legislature passed the Longevity Bonus Act, the question of

its constitutional validity was unsettled. Although petitioner references information on this point that is not before this Court, 1/ it should suffice to say that at no time prior to the filing of the instant suit did the attorney general issue a formal opinion that the law was in fact unconstitutional. The law went unchallenged for ten years. Absent a judicial declaration that the Longevity Bonus Act was constitutionally invalid, the program was carried out. 2/

1/ The factual evidence regarding the state's constitutional analysis of the Longevity Bonus Program is not material to the instant petition for certiorari. The issue presented herein is whether a cause of action for damages exists.

2/ See App. C1-C4, wherein the superior court concluded that the law's unconstitutionality was not "clearly established" until the court so ruled in the instant case.

Three weeks after this Court decided Zobel v. Williams, 457 U.S. 55 (1982), petitioner brought suit against the administrator of the Longevity Bonus Program, Marian Schafer, and the State of Alaska. See Schafer v. Vest, 680 P.2d 1169 (Alaska 1984). As representative of a class of persons 65 years of age or older who were not recipients of longevity bonuses, petitioner sought three things: 1) a judicial declaration that the program was unconstitutional; 2) judicial severance of the offensive provisions of the statutory scheme, allowing the class to be included in the program prospectively; and 3) retroactive benefits or damages for the period of time the class was excluded from the program.

The superior court granted petitioner summary judgment on the constitutional issue. Id. at 1170. However, in

light of the fact that the legislature had enacted an express non-severability provision (§ 3, ch. 205, SLA 1972; App. B7), the court denied petitioner the relief requested in that regard. The Alaska Supreme Court affirmed the constitutional holding; the non-severability issue was not appealed. Id.

Petitioner then moved for damages against the state and Ms. Schafer, alleging that he and the class were entitled to retroactive benefits as a remedy for the unconstitutional Longevity Bonus Program. See Vest v. Schafer, 757 P.2d 588, 589 (Alaska 1988). The motion claimed that the state was liable for damages under 42 U.S.C. § 1983 or, in the alternative, under a cause of action directly implied from the state constitution or the Fourteenth Amendment under the rationale of Bivens v. Six Unknown

Named Agents, 403 U.S. 388 (1971). Vest, 757 P.2d at 589. Petitioner also sought damages from Ms. Schafer under the same theories. Id.

The superior court denied petitioner's motion, instead granting summary judgment in favor of the respondents. Id. The court found that the state was not subject to suit under 42 U.S.C. § 1983, in accordance with the decision of State v. Green, 633 P.2d 1381 (Alaska 1981), which held that the state was not a "person" under that law. Moreover, the superior court found the state immune from actions brought directly under the state or federal constitution, without deciding whether a Bivens cause of action could lie in this case. Under the rationale of Kentucky v. Graham, 473 U.S. 159, 165-66 (1985), claims against Ms. Schafer in her official capacity were

essentially against the state and were disposed of on the same basis. 3/ Personal capacity claims against Ms. Schafer were rejected on the grounds that she was entitled to qualified good faith immunity as a matter of law. App. C1-C4.

The superior court recognized two additional obstacles to the relief sought by petitioner under a Bivens-type cause of action.

> First, Bivens was predicated on a factual situation where injunctive or declaratory relief would be useless because the person had already been injured when the unconstitutional act occurred and suit was brought.... After reviewing the uselessness of other types of relief, Justice Harlan, in concurrence, wrote the now-familiar words: "For people in Bivens' shoes, it is damages or nothing." [Citation omitted.]

3/ The petition herein does not challenge this treatment of the official capacity claims below.

> That is not the case here. When the unconstitutional act -- passage of the legislation -- occurred, plaintiff Vest or other members of the plaintiff class were free to seek declaratory and injunctive relief, which would have given them the full judicial relief to which they would have been entitled. They could have stopped the program at the outset, thus avoiding any "injury". It is only because the plaintiff(s) did not bring this action sooner that they can now even claim that there has been a compensable "injury". The law should not countenance such an anomalous result.

App. C5-C6.

Moreover, the superior court noted that a damages remedy based on "back payments" is inappropriate because it would be "tantamount to judicial enactment of a longevity bonus program which included the plaintiffs as beneficiaries from the start." App. C7. Had a court ruled the program unconstitutional at its inception, the legislature had no duty to

create any particular program which included petitioner among its beneficiaries. Recognizing that the legislature could have contemplated any number of approaches, including having no program at all, the court concluded it was not in a position to determine what the legislature would or should have done. App. C7-C9.

The Alaska Supreme Court affirmed the lower court's ruling with respect to the state's liability for damages under 42 U.S.C. § 1983. Vest, 757 P.2d at 594. Deciding that, in the circumstances of this case, a Bivens cause of action against the state would not be recognized by a federal court under the Fourteenth Amendment, the court found no theory available for obtaining damages from the state for an unconstitutional law. Id. The supreme court did not reach the

question of whether immunity barred petitioner's claims against Ms. Schafer personally, finding instead that the program administrator was not a proper defendant in an individual capacity. Id. at 599-601. "The essence of Vest's lawsuit is a challenge of state statutes, not a challenge of Schafer's behavior." Id. at 601. The court therefore concluded that imposition of personal liability, merely for executing legislative mandates, without any "wrongful individual action," was inappropriate.

REASONS FOR DENYING THE WRIT

Several compelling reasons justify denial of the petition for certiorari. Most significant is the simple fact that no court has ever recognized a damages remedy, as petitioner requests, for the

enactment and execution of legislation later found to be unconstitutional.

Petitioner asserts that "the dispositive issue in this case is whether the State enacted and enforced legislation in good faith." Petition, p. 9. That is not correct. The issue is one of remedy. The Alaska Supreme Court's decision in Vest v. Schafer is in keeping with the great weight of authority that the remedy for an invalid law is to strike the law, not to award damages. 4/

4/ The Alaska Supreme Court did not need to address the state's good faith in enacting or enforcing legislation to dispose of this case. The superior court found good faith on the part of the administrator who executed the program, because the law's unconstitutionality was not clearly established until the court ruled in the instant case. See n.2, supra; App. C1-C4.

The reasons proffered in support of the petition do not meet the standard expressed in Supreme Court Rule 17.1. The Vest decision does not conflict with decisions of other state courts of last resort, federal courts of appeal, or this Court with respect to a federal question. Moreover, Vest does not present an important question of heretofore undecided federal law which should be settled by this Court.

I. The Fact That This Court Has Already Decided To Review Whether A State Is A "Person" Subject To Suit Under 42 U.S.C. § 1983 Militates Against Review Of That Portion Of The Alaska Supreme Court's Decision In Vest v. Schafer.

As petitioner has acknowledged, this Court has decided to review the question of whether a state is a "person" subject to suit under 42 U.S.C. § 1983 this term. Smith v. Department of Public Health, 410

N.W.2d 749 (Mich. 1987), cert. granted sub nom. Will v. Michigan Department of State Police, __ U.S. __, 108 S.Ct. 1466, 99 L.Ed.2d 696 (Apr. 19, 1988). The Will case is in precisely the same posture on the issue of state liability under § 1983 as the instant case: the Michigan Supreme Court found, as has the Alaska Supreme Court, that the state is not a person for purposes of that law. Smith, 410 N.W.2d at 766. The respondents understand that all briefs have been filed in that action, including no fewer than three briefs of amici curiae. Oral argument is scheduled for December 5, three weeks from now.

Because the Court's decision in Will will fully settle the question of whether a state is a "person" under § 1983, that portion of the Vest decision will not present "an important question of federal

law which has not been, but should be, settled by this Court." Supreme Court Rule 17.1(c). That being the case, there is no special or important purpose to be served by this Court reviewing the § 1983 aspect of Vest.

II. Whether A State Court Must Recognize A Bivens Cause Of Action For Damages Against A State, Based On The State's Enactment Of A Law Later Found To Be Invalid Under The Fourteenth Amendment, Does Not Present A Conflict This Court Needs To Resolve.

Although invited by petitioner to do so, the Alaska Supreme Court declined to recognize a cause of action for damages against the state stemming directly from the Fourteenth Amendment to the United States Constitution under the rationale of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Vest, 757 P.2d at

594-98. More specifically, the court held that

> a Bivens-type action, brought in state court against the State, cannot be allowed to stand when it is grounded on a claim that the legislature enacted a law later found to violate the equal protection clause of the fourteenth amendment of the Constitution.

Id. at 598. The Vest court expressly did not decide that there was no situation in which unconstitutional behavior could give rise to a federal Bivens-type action against the state in state court. Id. at 598 n.36.

While this Court has stated that the question of availability of a Bivens claim under the Fourteenth Amendment is "extremely important," that fact alone is not determinative of whether the petition for certiorari should be granted in this case. See Mt. Healthy City School District Board of Education v. Doyle, 429

U.S. 274, 278 (1977). Several additional variables involved in Vest moot the question of whether a Fourteenth Amendment violation can be remedied by a Bivens-type damages claim.

In Bivens, 403 U.S. at 389-97, this Court recognized a cause of action for damages under the Fourth Amendment against federal employees acting under color of their authority. The Bivens rationale has been applied to create remedies against federal agents in the context of the Fifth Amendment, Davis v. Passman, 442 U.S. 228 (1979), and the Eighth Amendment, Carlson v. Green, 446 U.S. 14 (1980). However, this Court's "more recent decisions have responded cautiously to suggestions that Bivens remedies be extended into new contexts." Schweicker v. Chilicky, ___ U.S. ___, 108 S.Ct. 2460, 2467 (1988); Bush v. Lucas,

467 U.S. 267 (1983); Chappell v. Wallace, 462 U.S. 296 (1983). Moreover, a Bivens cause of action may be defeated where there are "special factors counselling hesitation in the absence of affirmative action by Congress." Bivens, 403 U.S. at 396; see also Carlson, 446 U.S. at 18.

Even assuming arguendo that the Fourteenth Amendment supported a Bivens cause of action, separation of powers concerns and notions of federalism preclude such a judicially created remedy against a state under the circumstances of this case. As the Alaska Supreme Court noted, the traditional remedy for an unconstitutional statute is declaratory or injunctive relief. Vest, 757 P.2d at 594. "Neither the United States nor any state has ever been liable for damages because its legislative body has enacted legislation that is later held

unconstitutional." K. Davis, Administrative Law Treatise, § 25.00-4 (1982 Supp.). See also HFH, Ltd. v. Superior Court of Los Angeles County, 542 P.2d 237, 245 (Cal. 1975), cert. denied 425 U.S. 904 (1976). If a court held a state responsible for unconstitutional legislation in terms of money damages, the process of legislating would be profoundly inhibited.

A judicially created remedy against states is inappropriate additionally because of the states' "independent status in our constitutional scheme." Vest, 757 P.2d at 596. "Congress, where the states are represented, is in a better position than the federal judiciary to weigh the competing policies implicated in creating an entirely novel damages remedy against states." Id. Insofar as the decision whether to imply a damage remedy for

constitutional violations is a matter of federal policy, and the nation has a strong interest in the vitality of a state's legislative process, the court found it would be poor federal policy to require state judiciaries to impose damages for unconstitutional state laws "in the absence of congressional mandate." Id. at 597-98.

Injunctive relief is adequate to protect petitioner's rights and "vindicate the federal interest in assuring the Supremacy of [its] law." Green v. Mansour, 474 U.S. 64, 106 S.Ct. 423, 426 (1985). The chilling effect of extending damages liability to the very act of legislating, which has historically been immune from suit, is clearly a special factor counselling hesitation in the creation of a Bivens remedy in this case.

In analyzing the availability of a judicially created damages remedy for an unconstitutional law, the Alaska Supreme Court did not deviate from the analysis set forth by this Court in Bivens and its progeny. Furthermore, the Vest decision on this point does not conflict with authority from federal appellate courts or other state courts of last resort. Supreme Court Rule 17.1.

Finally, it should be noted that this Court has not recognized a Bivens remedy against anyone but federal agents acting under color of their authority. See Vest, 757 P.2d at 595 n.23. Because federal agents are not subject to suit under 42 U.S.C. § 1983, federal Bivens actions can be viewed as a complement to

§ 1983 actions against state officials. 5/ The absence of authority from any court holding a nonfederal, governmental entity liable under a federal Bivens claim militates against granting the petition for certiorari.

Because Vest is in keeping with the decisions of this Court and of other jurisdictions, and because it does not present an appropriate case to answer the Bivens question left unresolved in Mt. Healthy, 429 U.S. at 278, this Court should deny the petition on the Bivens issue.

5/ See, e.g., Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984); Butz v. Economou, 438 U.S. 478, 504 (1971) (same qualified immunity applies in suits against state officers under § 1983 and in suits against federal officers under Bivens).

III. The Alaska Supreme Court's Holding That Ms. Schafer, Who Merely Executed A Program According To State Law And Did Nothing Wrongful, Was Not A Proper Defendant In A Personal Capacity For Damages Does Not Conflict With Decisions Of This Court.

As stated above, the Alaska Supreme Court found that the administrator of the Longevity Bonus Program was not subject to suit in her personal capacity under the theories advanced by petitioner. Vest, 757 P.2d at 599-601. Ms. Schafer was not a proper defendant in her personal capacity because she merely executed the program according to state law, and did not engage in any wrongful individual conduct. Id.

Because petitioner's complaints failed to specify whether Ms. Schafer was being sued personally, officially, or

both, id. at 599, 6/ the court was called upon to determine "the nature of the liability sought to be imposed." See Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985); Brandon v. Holt, 469 U.S. 464, 469 (1985). One consideration is whether the state is the "real party in interest." Kentucky, 473 U.S. at 166. Because petitioner alleged an interest in seeking relief from any liability insurance, official bond, or indemnification agreement applicable to Ms. Schafer (the actual existence of which was not evident in the record), the "real party in interest" analysis was inconclusive. Vest, 757 P.2d at 600.

6/ Official capacity claims were treated the same as claims against the state. Vest, 757 P.2d at 598-99. That is not at issue here. See n.3, supra.

However, there is another consideration involved in determining whether a claim is against a state agent personally or against the state itself." Relying on language from this Court's unanimous decision in Ford Motor Co. v. Dept. of Treasury of the State of Indiana, 323 U.S. 459, 462 (1945), the Alaska Supreme Court identified "whether there is wrongful individual action" as a decisive criterion. Vest, 757 P.2d at 600. While the court acknowledged that Ford Motor Co. involved the Eleventh Amendment, which was clearly not at issue in Vest, the court saw no reason for the test of whether a suit is against a state or an individual to differ in the contexts of the Eleventh Amendment, § 1983, and Bivens. Id.

In this case the program administrator merely complied with legislative

mandates, issuing bonuses only to those who were eligible under the statutes. Id. Such conduct was not wrongful. A state official is under no duty to question the law's validity or refuse to discharge the ministerial duties with which she is charged by law. "To require disobedience on the part of government employees whenever their personal assessment of an enactment differs from that of the legislature would accomplish little other than creating chaos in government." Id. at 601.

Because the complaint and the record essentially challenged state statutes, not Ms. Schafer's behavior, claims against the administrator in her personal capacity were inappropriate. It is therefore unnecessary to determine whether, as the superior court had concluded (See App. C1-C4), qualified good

faith immunity bars petitioner's claims against Ms. Schafer individually.

The Vest holding on the matter of personal liability is not at odds with previous decisions of this Court. The cases cited by petitioner all pertain to whether individual liability, or immunity, will flow from wrongful activity. Petitioner does not acknowledge the distinction between whether an individual is a proper defendant in a personal capacity, under the rationale of Kentucky v. Graham and Ford Motor Co., supra, and whether the individual is entitled to immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982). The Alaska Supreme Court has recognized the distinction, in full adherence to this court's holdings.

Not surprisingly, petitioner cites no cases to support his contention that a damage claim can be predicated simply on

an official's non-negligent enforcement of a law later held by a court to be unconstitutional. While petitioner contends that Ms. Schafer should be subject to suit because there was "no colorable basis" for her execution of the law, the simple fact remains that petitioner's complaint is with the law, not the individual. See Rosado v. Wyman, 414 F.2d 170, 178 (2d Cir. 1969), rev'd on other grounds, 397 U.S. 397 (1970) (attack on state statute, not on action taken under it, made suit one properly against the state, not against state official as an individual).

The Alaska Supreme Court's decision in Vest is in harmony with the law enunciated by this Court. Had petitioner challenged arbitrary enforcement of the law, for example, then he could properly sue the responsible official in a

personal capacity under § 1983. At that point, the test for determining good faith immunity under Harlow would apply. However, the instant case presents no such facts. Because the Vest decision does not raise an important conflict for this Court to resolve, the petition for certiorari regarding Ms. Schafer's personal liability should be denied.

CONCLUSION

Petitioner failed to articulate a theory to the Alaska Supreme Court under which he would be entitled to damages. He has similarly failed to articulate sufficiently substantial issues to

warrant this Court's consideration. 7/ Supreme Court Rule 17.1.

The appropriate remedy for an invalid law -- declaratory and injunctive relief -- has already been provided. Petitioner is entitled to nothing more from any court. To rule otherwise would drastically impede states' experimentation with social and economic change.

7/ To the extent that petitioner has made no argument whatsoever regarding paragraphs 5 and 7 of the "Questions Presented" in his petition (p. i), he has not shown any special and important reasons for granting the petition on those points. Supreme Court Rule 17.1. Additionally, it is not evident from the petition or appendix that these issues were properly raised in the courts below. See Supreme Court Rule 21(h). Consequently, this Court should reject the petition on these points.

For the reasons expressed herein, respondents request that the petition for certiorari be denied.

RESPECTFULLY SUBMITTED this 10th day of November, 1988.

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: Susan D. Cox
Susan D. Cox
Assistant Attorney General
Attorney for Respondents

APPENDIX C

Excerpt from Memorandum of Decision, issued by Superior Court Judge Walter L. Carpeneti February 20, 1987

2. §1983 claim against Marian Schafer in her individual capacity.

A government official sued in her individual capacity under §1983 is entitled to a qualified good faith immunity for official acts. Wood v. Strickland, 43 L. Ed. 2d 214, 225 (1975); Scheuer v. Rhodes, 40 L. Ed. 2d 90 (1974) (official not immune if he knew or should have known that the action he took violated settled or unquestioned constitutional rights). Harlow v. Fitzgerald, 73 L. Ed. 2d 396 (1982) deleted the subjective element of this test, casting it in objective term to meet the admonition in Butz v. Economou, 57 L. Ed. 2d 895, 916 (1978) that insubstantial claims should not

proceed to trial:...[quotation omitted]. Harlow v. Fitzgerald, 73 L. Ed. 2d at 410.

Defendants have argued persuasively that the law was not "clearly established" until the decision of the Supreme Court of Alaska affirmed the trial court in striking down the program. Although some doubts were raised about the program, no person ever brought a legal challenge in the first 10 years of its existence. Moreover, even a legal scholar as sympathetic to the plaintiff's point of view concerning durational residency requirements as Justice Dimond (who wrote the opinion for the court striking down the tax relief statute in Williams v. Zobel, 619 P.2d 422 (Alaska 1980) and whose dissent in the permanent fund dividend case, Williams v. Zobel, 619 P.2d 448 (Alaska 1980) was later vindicated by

the United States Supreme Court) suggested in his dissent in the permanent fund dividend case that the longevity bonus program was distinguishable from the permanent fund dividend program and thus constitutionally valid, id. at 469 n. 13.... In any event, it is simply not accurate to conclude that the unconstitutionality of the longevity bonus program was "clearly established" before the courts ruled. Under these circumstances, there is no disputed issue of material fact and thus summary judgment in Marian Schafer's favor is appropriate.

. . . .

4. Bivens-type claim against Marian Schafer in her individual capacity.

A public official sued in her individual capacity is entitled to a qualified good faith immunity against Bivens actions as well as §1983 actions. As the

court stated in Davis v. Scherer, 82 L. Ed. 2d 139 (1984), "the same qualified immunity rules apply in suits against state officers under §1983 and in suits against federal officers under Bivens." Id. at 149-50 n.12. See also Butz v. Economou, supra, 57 L. Ed. 2d at 914. Therefore, the analysis used in Part 2, above, is equally applicable here. Because the law was not "clearly established" before the courts ruled, Ms. Schafer enjoys immunity for her good faith administration of the law in question.

In addition to the bars posed by the doctrine of sovereign immunity (guaranteed by the federal constitution, partially waived by the Alaska Constitution and embodied now in a limited form in AS 09.50.250) discussed in Part 3, above, and the doctrine of qualified good faith

immunity discussed in Part 4, above, there are at least two further obstacles to the relief sought by the plaintiff under a Bivens-type cause of action.

First, Bivens was predicated on a factual situation where injunctive or declaratory relief would be useless because the person had already been injured when the unconstitutional act occurred and suit was brought. 9/ Bivens' abode had already been invaded; he had already been arrested and manacled in front of his family, whose arrest was also threatened; and his apartment had already been searched "from stem to stern". He had already been interrogated, booked and

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9/ As the Court summarized in Butz v. Economou, supra, 57 L. Ed. 2d at 915: "Injunctive or declaratory relief is useless to a person who has already been injured."

strip searched. Bivens, supra, 29 L. Ed. 2d at 622. After reviewing the uselessness of other types of relief, Justice Harlan, in concurrence, wrote the now-familiar words: "For people in Bivens' shoes, it is damages or nothing." Id. at 635. That is not the case here. When the unconstitutional act -- passage of the legislation -- occurred, plaintiff Vest or other members of the plaintiff class were free to seek declaratory and injunctive relief, which would have given them the full judicial relief to which they would have been entitled. They could have stopped the program at the outset, thus avoiding any "injury". It is only because the plaintiff(s) did not bring this action sooner that they can now even claim that there has been a compensable "injury". The law should not countenance such an anomalous result.

Second, a damages remedy based on "back payments" is inappropriate in this case because a court does not have the power to legislate, and an award of "back payments" would be tantamount to judicial enactment of a longevity bonus program which included the plaintiffs as beneficiaries from the start. Neither this nor any other court has that power. While the legislature was free to enact such a program if it chose to, and while the legislature was not free to structure a program which included an unconstitutional residency requirement, 10/ that is not the same as saying that the legislature had a duty to create any particular program, and that the failure to create

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10/ Schafer v. Vest, 680 P.2d 1169 (Alaska 1984).

one which included plaintiffs as beneficiaries constituted a breach of that duty for which the state is answerable in damages. It seems unexceptionable to say that the legislature, if confronted with a court ruling in 1972 that the plan it adopted was unconstitutional, might well have decided that the state could not afford a program which would be constitutionally acceptable. Or it might have decided that it could afford a program which passed constitutional muster but only at a lower level of benefits for each recipient. Or it might have decided to structure an entirely different program. Or it might have abandoned the idea. That it <u>might</u> have taken any of these approaches (or none of them) suggests to this court that it would be wholly inappropriate for a judicial remedy to be fashioned now which in effect

says the legislature would have adopted a particular one had the constitutional law been clearly established at that time, or that it should have done so.

CONCLUSION

For the reasons expressed above, the court denies the plaintiff's motion for summary judgment for an award of back benefits and grants the state's cross motion for summary judgment.

DATED this 20th day of February, 1987.

Walter L. Carpeneti
Superior Court Judge

Supreme Court, U.S.
FILED
NOV 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-447

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RODNEY G. VEST

Petitioner

v.

MARIAN SCHAFER and STATE OF ALASKA

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF ALASKA

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IN THE
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RODNEY G. VEST
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v.

MARIAN SCHAFER and STATE OF ALASKA
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF ALASKA

Respondents Marian Schafer and the State of Alaska argue that the petition of Rodney G. Vest and the class which he represents ("Vest") should be not be granted because "no court has ever recognized a damages remedy, as petitioner requests, for the enactment and execution of legislation later found to be unconstitutional."[1] Not only do respondents mischaracterize the authority upon which they rely,[2] they fail

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[1] Brief of Respondents in Opposition, pp. 11-12.

[2] K. Davis, *Administrative Law Treatise*, § 25.00-4 (1982 Supp.)

to direct this Court's attention to the authority raised below which proves this contention to be in error.[3]

In *Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982) Florida's highest court considered whether a state statute granting tax preferences based on length of residency violated equal protection guarantees. Relying on this Court's holding in *Zobel v. Williams*, 457 U.S. 55 (1982),[4] the court concluded that the statute lacked a rational basis and awarded a refund of past taxes to those litigants who challenged the statute. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), this Court reversed a federal district court's refusal on eleventh amendment grounds to award damages, in the form of retroactive benefits, for state legislation that violated the equal protection provisions of Title VII of the Civil Rights Act of 1964. The Court affirmed that Congress' determination to make the states answerable for damages in federal courts for the violation of equal protection was consistent with its enforcement powers under the fourteenth amendment.

The question presented by the underlying decision is whether states are subject to constitutionally based damage actions brought in their own courts. Florida has decided in the affirmative. Congress' considered determination to subject the states to such actions in federal courts evidences that there are sound policy underpinnings for the damage remedy which Vest seeks. Contrary to the assertions of the respondents, there is persuasive precedent for Vest's claims.

Respondents cite the findings of the trial court in the proceedings below in support of the contention that the

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[3] Respondents cite authority in the decision raised below which supports their position, but fail to cite contrary authority also addressed therein. *Vest v. Schafer*, 757 P 2d (Alaska, 1988), *App.* p. A15, n. 19.

[4] *Id* at 543-44.

unconstitutionality of the residency provisions of Alaska's Longevity Bonus Act was "not 'clearly established' until the court so ruled in the instant case."[5] Although the trial court did make such a finding, it is entirely without support in the record. The record, in fact, very clearly demonstrates precisely the opposite. Vest expressly challenged this finding on appeal.[6] The Alaska Supreme Court did not affirm the determination of the trial court. Rather, the court held that "a *Bivens*-type action, brought in state court against the State, cannot be allowed to stand when it is grounded on a claim that the legislature enacted a law later found to violate the equal protection clause of the fourteenth amendment of the Constitution."[7] Since a law will always be found to violate the Constitution only after it has been enacted, the apparent unconstitutionality of a statute presents no inhibition to the State's enforcement of it under this holding. Consequently the trial court's unfounded and unperfected determination is not germane to the Court's consideration of this petition.

Respondents also cite portions of the trial court's decision in the proceedings below which assert that Vest created the injury of which he complains by failing to challenge the offending statute at its inception.[8] Not only is the logic of this proposition questionable, but the procedural history of the underlying case evidences, as a practical matter, that it is not correct. This Court decided *Zobel v. Williams*, 457 U.S. 55, on June 14, 1982. *Zobel* established beyond good faith dispute that the residency requirements in Alaska's Longevity Bonus Act were unconstitutional. Vest brought suit on July 6, 1982 challenging these requirements. The State of Alaska kept the offending requirements in place and made millions of dollars in exclusionary payments by litigating in

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5 Brief of Respondents in Opposition, p. 4, n. 2.

6 Appellant's Brief, pp. 35-39.

7 *App.*, pp. A21-22.

8 Brief of Respondents in Opposition, pp. 8-9.

bad faith for almost two more years. The State was not barred from making these payments until April 6, 1984. The class could not have avoided injury for the period of time required to have the law judicially invalidated even if its action had been filed on the day the law was enacted.[9]

Respectfully submitted,

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[9] Although respondents raise other arguments in support of their opposition to Vest's petition, Vest does not believe that they are of sufficient merit to warrant further discussion.